TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1926

No. 207

ARNOLD J. REBSTOCK, UNITED STATES COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 15, 1926
CERTIORARI GRANTED OCTOBER 18, 1926

(28074)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 507

ARNOLD J. HELLMICH, UNITED STATES COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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A [Caption omitted.]

1 [Citation in usual form showing service on Claude M. Crosby, filed June 12, 1925, omitted in printing.]

2 In United States District Court, Eastern District of Missouri

No. 6695

MISSOURI PACIFIC RAILROAD COMPANY, PLAINTIFF

vs.

ARNOLD J. HELLMICH, UNITED STATES COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Writ of error

Filed June 12, 1925

The President of the United States to the honorable judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, greeting:

Because, in the record and proceedings, and in the rendition of the judgment in a cause which is in the district court before you, at the March term, 1925, wherein the Missouri Pacific Railroad Company was plaintiff and Arnold J. Hellmich, collector, was defendant, it is alleged manifest error hath happened to the injury and damage of the plaintiff, as by its complaint appears.

Therefore, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we do command you that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the 8th Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals for the 8th Circuit on or before sixty days from date hereof, to the end that the records and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws of the United States should be done.

3 Witness the honorable Chas. B. Faris, judge of the District Court of the United States within and for the Eastern District of Missouri this 12th day of June, 1925.

Issued at office in the city of St. Louis with the seal of the district court and dated as aforesaid.

JAS. J. O'CONNOR,
Clerk, District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

[Seal U. S. Dist. Court, Eastern Division, East. Jud. Dist. of Mo.]

Allowed by C. B. Faris, judge.
[File endorsement omitted.]
[Return to writ of error omitted in printing.]
[Caption omitted.]

4 In United States District Court

[Title omitted.]

Petition filed March 28, 1924

The plaintiff states that it is a railroad corporation duly organized under the laws of the State of Missouri and is the owner of and engaged in operating divers lines of railroad situated in the States of Missouri, Arkansas, Kansas, Nebraska, Colorado, Illinois, and Louisiana, and of certain branch lines connected therewith, and its principal office is located in the city of St. Louis, Missouri.

That defendant, Arnold J. Hellmich, is the duly authorized acting collector of the revenue for the United States and has his office as such in the city of St. Louis and State of Missouri.

That the amount in controversy as set out in the petition exceeds the sum of three thousand dollars ($3,000.00), and plaintiff's right to sue for same against defendant arises under the laws of the United States, to wit, the revenue laws of the United States and the regulations adopted thereunder.

Plaintiff states that the Western Union Telegraph Company, a company duly organized under the law for the purpose of
5 operating various and divers lines of telegraph for the transmittal of telegraph messages for the public, for hire, also has and maintains an office in the city of St. Louis and divers other offices throughout the United States; that on or about the 24th day of October, 1911, a contract in writing was entered into between the Western Union Telegraph Company and the Missouri Pacific Railway Company and St. Louis Iron Mountain & Southern Railway Company, each of which railway companies were common carriers engaged in interstate commerce and subject to the acts of Congress to regulate interstate commerce, by which contract, in consideration of certain services to be rendered by such railway companies to the Western Union Telegraph Company and certain other considerations therein expressed, said telegraph company agreed to transmit over its telegraph lines for said two railway companies certain telegraphic messages without payment of charge other than that afforded by the

services rendered to the telegraph company by the railway companies, and the other considerations as set forth in said contract.

Plaintiff files with this petition and as an exhibit thereto, a printed copy of said contract and avers that the portions thereof, which are material to the cause of action hereinafter set forth and pleaded, are as follows, to wit:

"Fourth. The telegraph company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroad covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, to be authorized by frank permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company, to be issued to such officers and agents of the railway companies as may be designated by their presidents or general managers; and the railway companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the telegraph company may require for employes, supplies and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews, and equipment for distribution service, and outfit, boarding, and tool cars for work on the lines along said railroads, whenever required by the telegraph company. The transportation of employes to be authorized by passes to be issued by the railway companies on request of the superintendent or other authorized officer of the telegraph company.

6 Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of service rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty-five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during each year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that, in the event that each of the parties hereto is rendered bills for such services in excess of $75,000.00 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000 there shall be no payment by either party to the other therefor.

Fifth. * * * At stations of the railway companies or either of them where the railway companies maintain either a telegraph

or telephone operator and where the number of sent paid and collect messages, whether sent by telegraph or telephone from any such station, are less than three thousand (3,000) a year, the operators and other employees of the railway companies, acting as the agents of the telegraph company, shall receive and transmit over the telegraph or telephone wires or circuits of either party, as may be most convenient, and shall deliver exclusively for the telegraph company, party hereto, such commercial or public messages as may be offered, and shall charge the tariff rates of the telegraph company thereof, and shall render to the telegraph company monthly statements of such business and full accounts of all receipts therefrom, and shall pay all of such receipts to the telegraph company in such manner and at such times as it may direct. The railway companies, or either of them, shall not be held liable for receipts from commercial or public telegraph business not paid over to the telegraph company by said railroad employes.

Said operators and employees shall not, without the consent
7 of the telegraph company, transmit over the wires of either party hereto any free messages except those on the railway companies' business, and concerning all business of the telegraph company, whether paid or free, and whether sent by telegraph or telephone, shall conform to all rules, regulations, and orders of the telegraph company applicable thereto; provided, however, that such employees shall not be required to deliver commercial or public messages when it will interfere with their railroad duties, but all reasonable attention shall be given by such employes to the prompt delivery of such messages; and the telegraph company, when in its opinion it is necessary, shall employ messengers, whose wages shall be divided between the parties hereto according to the division of the gross receipts at such offices."

Plaintiff further states that on or about the 1st day of June, 1917, the plaintiff, Missouri Pacific Railroad Company, acquired and came into possession of the railroad property previously owned and operated by the Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company, by virtue of a sale of said properties in certain foreclosure proceedings in the United States District Court of the city of St. Louis, and that thereafter this plaintiff assumed the obligations imposed on said former railway companies under the contract theretofore entered into with the Western Union Telegraph Company and succeeded to all the rights of said former railway companies under said contract with said telegraph company, including the rights set forth in said contract as to the transmission of certain telegraphic messages without charge other than the services and considerations provided for in said contract, and since plaintiff purchased the properties formerly belonging to said railway companies above named plaintiff has rendered said telegraph company the services required in said contract to be rendered to said company.

Plaintiff states that among the provisions enacted by the Congress of the United States in the revenue act of 1918 relative to the collection of certain taxes were the following:

"Src. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the revenue act of 1917.

* * * * * * *

8 (f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents; provided, that only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

(G) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct by a common carrier or telegraph or telephone company of its business as such:

* * * * * * *

Src. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * * * *

(c) The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. In case a carrier (other than a pipe line) principally engaged in rendering transportation services or facilities for hire does not, because of its ownership of the goods transported, or for any other reasons, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such goods if the carrier received payment for such transportation, such tax, if it can not be computed from the actual rates or tariffs of the carrier, to be computed on the basis of the rates or tariffs of other carriers for like services as determined by the commissioner. In the case of any carrier (other than a pipe line) the principal business of which is to transport goods belonging to it on its own account and which only incidentally renders services for hire, the tax shall apply to such services or facilities only as are actually rendered by it for hire, nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such

9 and is intended to be so used or has been so used; or (2)

upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

* * * * * * *

Sec. 502. That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of section 501 to the collector of the district in which the principal office or place of business is located.

* * * * * * *

Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so repaid may be credited against amounts included in any subsequent monthly return.

The returns required under this section shall contain such information and be made at such times and in such manner as the commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

Plaintiff further states that thereafter the Commissioner of Internal Revenue of the United States claiming the right and authority so to do, established and promulgated certain rules and regulations relative to the collection of taxes under the revenue act of Congress and particularly the following, known as Article IX of Regulations numbered 57, to wit:

"Messages transmitted under contract.—Where by contract a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performances of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500-f of the act). The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of the common carrier and whether they are 'on-line' or 'off-line' are immaterial. Thus a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business 'free' and all such messages over its lines off the railroad line 'free' to an amount not exceeding ten thousand dollars ($10,000.00) per year calculated at its regular rates, and all messages over that amount at half rates in consideration of services to

be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages whether 'on line' or 'off line' and whether 'free' or at half rates, are subject to the tax provided by this section (500-f) of the act. The tax must be computed, collected, and paid upon each such message."

Plaintiff avers that defendant herein as collector of the revenue of the United States acting under and by virtue of the regulations promulgated and adopted by the Commissioner of Internal Revenue of the United States, about the —— day of May, 1923, presented to the plaintiff a bill covering the amount claimed to be due from plaintiff on account of franked Western Union messages transmitted during the period from March, 1920, to July, 1922, inclusive, and which messages were sent under and pursuant to the contract with the Western Union Telegraph Company of October 24, 1911, which bill and claim aggregated the sum of ten thousand thirty-six dollars and eighty-five cents ($10,036.85); that thereafter, about the 23rd day of May, 1923, plaintiff, under protest, paid said demand of defendant on account of said messages, endorsing on its voucher of payment the following words:

"These taxes are paid under protest for the reason that Article IX of Regulations 57 is deemed to be unlawful and we expressly reserve the right to file suit to recover back this payment."

Plaintiff avers that demand, exaction, and collection of said sum of ten thousand thirty-six dollars and eighty-five cents ($10,036.85) covering messages for the period above named was unlawful
11 and unauthorized for the reason that under the provisions of the act of Congress referred to in this petition and under the provisions of the contract between the Western Union Telegraph Company and said railway companies, neither said telegraph company nor the defendant as the representative of the Government was entitled to recover and collect from plaintiff said amount of money and further, because under the provisions of sections 500, 501, and 502 of the revenue act passed by Congress in the year 1918, this plaintiff was only required to pay a tax to the Government on telegraphic messages on which transmission charges were collected.

Plaintiff further says that the regulations by the Commissioner of Internal Revenue of the United States and designated as Article IX, Regulations 57, wherein is asserted the right to collect taxes on franked or free telegraphic messages, are unauthorized and void and constitute no basis for the claim set up by defendant and on which plaintiff was required to pay the sum of money above set forth.

This plaintiff further says that said regulations of the Commissioner of Internal Revenue are purely departmental regulations and not authorized by the provisions of sections 500, 501, and 502 of the United States revenue act passed by Congress in the year 1918, and such departmental regulations furnish no basis for the exaction of said sum of money.

Plaintiff further says that after said payment it, in due form as authorized by the laws of Congress in such cases made and provided,

made its demand in writing on the Commissioner of Internal Revenue for the refund of such sum so paid by it as aforesaid; that said commissioner declined and refused to refund said sum of money to plaintiff.

Plaintiff says that under date of July 30, 1923, the Commissioner of Internal Revenue at Washington, D. C., advised the vice president and general solicitor of plaintiff as follows:

"Receipt is acknowledged of your letter dated July 12, 1923, accompanies by application for refund of a total of $14,792.95, taxes on Western Union frank messages. The items submitted are as follows:

"Paid May 23, 1923, for taxes on messages from March, 1920, to July, 1922	$10,036.85
"Paid June 28, 1923, for messages from August, 1922, to January, 1923, inclusive	6,756.10

12 "You are advised that the claim will date from July 16, 1923, the date of receipt of your letter and application in this office."

Plaintiff further states that thereafter under date of September 13, 1923, there was mailed to the United States Commissioner of Internal Revenue at Washington, D. C., duly executed, the form prescribed by said commissioner for refund of the taxes paid by plaintiff as set out in this petition; that said appeal to said commissioner for refund was duly received by him, and that he has rendered no decision or made no response to such appeal by the plaintiff for more than six months since the same was presented to him.

Wherefore plaintiff prays judgment against defendant for the sum of ten thousand thirty-six dollars and eighty-five cents ($10,036.85), together with its costs in this behalf expended.

II

For a second and further cause of action plaintiff, reaffirming and reasserting all the paragraphs hereinbefore pleaded in this petition which are applicable and material, avers that about the first day of June, 1923, defendant, as collector of internal revenue of the United States, made another and further demand upon the plaintiff for the amount of taxes claimed to be due the Government on franked Western Union messages transmitted during the period of from August, 1922, to January, 1923, inclusive, and which messages were sent under and pursuant to contract with the Western Union Telegraph Company of October 24, 1911, as follows:

August,	1922	$647.62
September,	"	604.55
October,	"	885.30
November,	"	797.25
December,	"	937.89
January,	1923	883.60
Making a total of		$4,756.10

That thereafter, about the 28th day of June, 1923, the plaintiff, under protest, paid said sum endorsing upon its voucher of payment the following words:

"These taxes are paid under protest for the reason that Article IX of Regulations 57 is deemed by us to be unlawful, and we expressly reserve the right to file suit to recover back this payment."

13 Plaintiff reaffirms as to the payment last above-mentioned all of the allegations set forth in the first count of this petition as to the illegal and unauthorized collection of said sum of four thousand seven hundred fifty-six dollars and ten cents ($4,756.10) and avers that immediately after said payment, which was made under protest, it filed its claim with the Commissioner of Internal Revenue of the United States for a refund of said amount so paid and said Commissioner of Internal Revenue declined and refused to make or authorize such refund.

Plaintiff says that under date of July 30, 1923, the Commissioner of Internal Revenue at Washington, D. C., advised the vice president and general solicitor of plaintiff as follows:

"Receipt is acknowledged of your letter dated July 12, 1923, accompanied by application for refund of a total of $14,792.95, taxes on Western Union frank messages. The items submitted are as follows:

"Paid May 23, 1923, for taxes on messages from March, 1920, to July, 1922	$10,036.85
"Paid June 28, 1923, for messages from August, 1922, to January, 1923, inclusive	4,756.10

"You are advised that the claim will date from July 16, 1923, the date of receipt of your letter and application in this office."

Plaintiff further states that thereafter under date of September 13, 1923, there was mailed to the United States Commissioner of Internal Revenue at Washington, D. C., duly executed, the form prescribed by said commissioner for refund of the taxes paid by plaintiff as set out in this petition; that said appeal to said commissioner for refund was duly received by him and that he has rendered no decision or made no response to such appeal by the plaintiff for more than six months since the same was presented to him.

Wherefore plaintiff prays judgment against defendant for the sum of four thousand seven hundred fifty-six dollars and ten cents ($4,756.10), together with its costs in this behalf expended.

JAMES F. GREEN,
M. U. HAYDEN,
Attorneys for Plaintiff.

14 In United States District Court

Record entries

December 30, 1924

Now on this day comes plaintiff in the above-entitled cause by its attorney, and comes also defendant by the United States district

attorney for the Eastern Judicial District of Missouri; whereupon said defendant by leave of court files herein his answer. And now said parties also by leave of court file herein their stipulation waiving a trial by jury of the issues herein joined, as well as their joint stipulation and agreed statement of facts; whereupon the introduction of testimony in behalf of plaintiff on the trial of said cause before the court is commenced and concluded, and such cause submitted to the court on the evidence adduced by plaintiff and the agreed statement of facts as aforesaid.

In United States District Court

Answer

Filed Dec. 30, 1924

Comes now Arnold J. Hellmich, collector of internal revenue for the first district of Missouri, by his attorney, Claude M. Crooks, assistant United States attorney, and for answer to plaintiff's petition filed herein, denies each and every allegation contained therein.

Wherefore having fully answered, defendant prays to go hence with his costs.

(Signed) CLAUDE M. CROOKS,
Assistant United States Attorney,
Attorney for Defendant.

In United States District Court

Stipulation waiving jury

Filed Dec. 30, 1924

It is hereby stipulated by and between the parties to the above-entitled cause, that a jury be waived and that the cause be tried by the court.

(Signed) EDWARD J. WHITE,
" JAMES F. GREEN,
" M. W. HAYDEN,
Attorneys for Plaintiff.
(Signed) CLAUDE M. CROOKS,
" CHAS. F. KEMPER,
Attorneys for Defendant.

15 In United States District Court

Stipulation of agreed statement of facts

Filed Dec. 30, 1924

It is hereby stipulated that the above-entitled cause shall be submitted to the court for decision on the following agreed statement of facts, either party having the privilege to offer additional evidence if desiring to do so, to wit:

The Western Union Telegraph Company, a company duly organized under the law for the purpose of operating lines of telegraph for the transmittal of telegraphic messages, on the 24th day of October, 1911, entered into a contract in writing with the Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company.

The contract, which is quite lengthy, contains the following paragraphs, which it is agreed are material to the questions involved in this case:

"Fourth. The telegraph company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroads covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, to be authorized by franks permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company, to be issued to such officers and agents of the railway companies as may be designated by their presidents or general managers; and the railway companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the telegraph company may require for its employes, supplies, and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews, and equipment for distribution service, and outfit, boarding and tool cars for work on the lines along said railroads, whenever required by the telegraph company. The transportation of employes to be authorized by passes to be issued by the railway companies on request of the superintendent or other authorized officer of the telegraph company.

"Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of services rendered. Services performed by either party for the other
16 for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty-five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during such year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that, in the event that each of the parties hereto is rendered bills for such services in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000 there shall be no payment by either party to the other therefor.

"Fifth. * * * At stations of the railway companies or either of them where the railway companies maintain either a telegraph or telephone operator, and where the number of send paid and collect messages, whether sent by telegraph or telephone, from any such station are less than three thousand (3,000) a year, the operators and other employes of the railway companies, acting as the agents of the telegraph company, shall receive and transmit over the telegraph or telephone wires or circuits of either party, as may be most convenient, and shall deliver exclusively for the telegraph company, party hereto, such commercial or public messages as may be offered, and shall charge the tariff rates of the telegraph company therefor, and shall render to the telegraph company monthly statements of such business and full accounts of all receipts therefrom, and shall pay all of such receipts to the telegraph company in such manner and at such times as it may direct. The railway companies or either of them shall not be held liable for receipts from commercial or public telegraph business not paid over to the telegraph company by said railroad employes.

"Said operators and employes shall not, without the consent of the telegraph company, transmit over the wires of either party hereto any free messages except those on the railway companies' business, and concerning all business of the telegraph company, whether paid or free, and whether sent by telegraph or telephone, shall
17 conform to all rules, regulations, and orders of the telegraph company applicable thereto; provided, however, that such employes shall not be required to deliver commercial or public messages when it will interfere with their railroad duties, but all reasonable attention shall be given by such employes to the prompt delivery of such messages; and the telegraph company, when in its opinion it is necessary, shall employ messengers, whose wages shall be divided between the parties hereto according to the division of the gross receipts at such offices.

"The telegraph company agrees to pay to the railway companies, as soon as practicable after the close of each month, ten (10) per centum of the gross cash receipts (excluding tolls on the railway companies' messages) received by the operators of the railway companies, acting for the telegraph company as hereinbefore provided, from commercial or public messages at offices in their stations, except that tolls on ocean cable messages and tolls or charges of other companies shall not be included in the division of such gross receipts, but shall be retained in full by the telegraph company.

"It is further agreed, that about the first day of June, 1917, the plaintiff in this cause, the Missouri Pacific Railroad Company, duly acquired and came into possession of the railroad properties previously owned and operated by the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company by virtue of a sale of said properties in receivership proceedings in the United States District Court of the city of St. Louis, and that thereafter the plaintiff in this cause assumed the obligations

imposed on said former railway companies under the contract entered into between them and the Western Union Telegraph Company, including the rights set forth in said contract as to the transmission of telegraph messages, and since the Missouri Pacific Railroad Company acquired the properties formerly belonging to the railway companies named in said contract the plaintiff has rendered the telegraph company the services required by the contract."

The provisions enacted by the Congress of the United States in the revenue act of 1918 relative to the collection of taxes on account of the transmission of telegraphic messages are as follows:

18 "Sec. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the revenue act of 1917—

* * * * * * *

"(f) In the case of each telegraph, telephone, cable, or radio dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

"(g) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date, this subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct by a common carrier or telegraph or telephone company, of its business as such;

* * * * * * *

"Section 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * * * *

"(c) The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. In case a carrier (other than a pipe line) principally engaged in rendering transportation services or facilities for hire does not, because of its ownership of the goods transported, or for any other reasons, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such goods if the carrier received payment for such transportation, such tax, if it cannot be computed from the actual rates or tariffs of the carrier, to be computed on the basis of the rates or tariffs of other carriers for like services as determined by the commissioner. In the case of any carrier

19 (other than a pipe line) the principal business of which is to

transport goods belonging to it on its own account and which only incidentally renders service for hire, the tax shall apply to such services or facilities only as are actually rendered by it for hire. Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

* * * * * * *

"Sec. 502. That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of section 501 to the collector of the district in which the principal office or place of business is located.

* * * * * * *

"Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so paid may be credited against amounts included in any subsequent monthly return.

"The returns required under this section shall contain such information and be made at such times and in such manner as the commissioner, with the approval of the Secretary, may by regulation prescribe.

"The tax shall, without assessment by the commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due."

After the enactment of said revenue act the Commissioner of Internal Revenue of the United States promulgated certain rules and regulations adopted by him relative to the collection of taxes under said revenue act and particularly the following, known as Article IX of regulations numbered 57, to wit:

"Messages transmitted under contract.—Where by contract a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500-f of the act). The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of the common carrier and whether they are 'on-line' or 'off-line' are immaterial. Thus a

telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business 'free' and all such messages over its lines off the railroad line 'free,' to an amount not exceeding ten thousand dollars ($10,000.00) per year calculated at its regular rates, and all messages over that amount at half rates in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether 'on-line' or 'off-line' and whether 'free' or at half rates, are subject to the tax provided by this section (500-f) of the act. The tax must be computed, collected, and paid upon each such message."

It is further agreed that the defendant as collector of internal revenue of the United States for the district, including the city of St. Louis, about the —— day of May, 1923, presented to the Missouri Pacific Railroad Company a bill for the amount of taxes referred to in the first count of the petition, to wit, ten thousand and thirty-six dollars and eighty-five cents ($10,036.85) claimed to be due from the railroad company on account of Western Union telegraphic messages transmitted during the period from March, 1920, to July, 1922, which messages were sent and transmitted under and in pursuance of the contract between the Western Union Telegraph Company and the Missouri Pacific Railroad Company, as successor of the two railway companies named in the contract of October 24, 1911; that plaintiff paid said demand of defendant on account of said messages, endorsing on its voucher of payment the following words:

"These taxes are paid under protest for the reason that Article IX of Regulations 57 is deemed to be unlawful, and we
21 expressly reserve the right to file suit to recover back this payment."

That thereafter, on the first day of June, 1923, defendant as said collector of internal revenue made a further demand upon the plaintiff for the amount of taxes claimed to be due the Government on franked Western Union messages transmitted during the period from August, 1922, to January, 1923, which claim is itemized by months in the second count of the petition in the cause and aggregates the sum of four thousand seven hundred fifty-six dollars & ten cents ($4,756.10), and that thereafter, about the 28th of June, 1923, plaintiff also under protest paid said last-named sum, endorsing upon its voucher of payment the following words:

"These taxes are paid under protest for the reason that Article IX of Regulations 57 is deemed by us to be unlawful and we expressly reserve the right to file suit to recover back this payment."

Plaintiff also under date of July 12, 1923, made a demand for refund of the amount paid.

That under date of July 30, 1923, the Commissioner of Internal Revenue at Washington, D. C., advised the vice president & general solicitor of the Missouri Pacific Railroad Company as follows:

"Receipt is acknowledged of your letter dated July 12, 1923, accompanied by application for refund of a total of $14,792.92, taxes on Western Union frank messages. The items submitted are as follows:

"Paid May 23, 1923, for taxes on messages from March, 1920, to July, 1922	$10,036.85
"Paid June 28, 1923, for messages from August, 1922, to January, 1923, inclusive	4,756.10

"You are advised that the claim will date from July 16, 1923, the date of receipt of your letter and application in this office."

The term "franked message" as herein used means messages transmitted for the benefit of the carrier under the contract.

That thereafter, under date of September 13, 1923, there was mailed by plaintiff to the United States Commissioner of
22 Internal Revenue at Washington, D. C., duly executed, the form prescribed by said commissioner for claim for refund of the taxes paid by the plaintiff as set out in the two counts of its petition in this cause, aggregating the sum of fourteen thousand seven hundred ninety-two and 95/100 dollars ($14,792.95); that said appeal of plaintiff to said commissioner for refund was duly received by him and that he has failed to render any decision or make any response to such appeal for refund made by the railroad company for more than six (6) months after the same was presented to him; that this suit was filed March 28, 1924.

It is further agreed, that if the court finds for the plaintiff in the above case judgment should be rendered in its favor against the defendant for the aggregate of the sums claimed in the two counts of plaintiff's petition, to wit, the sum of fourteen thousand seven hundred ninety-two and 95/100 dollars ($14,792.95).

(Signed) EDWARD J. WHITE,
" M. U. HAYDEN,
" JAMES F. GREEN,
Attorneys for Plaintiff.

(Signed) CLAUDE M. CROOKS,
" CHAS. F. KENDLER,
Attorneys for Defendant.

In United States District Court

Judgment

April 4, 1925

This cause having been heretofore submitted to the court on stipulation of parties waiving a trial by jury, and the court having considered the issues herein joined, and being fully advised in the premises, doth find such issues in favor of defendant and against plaintiff. It is, therefore, ordered and adjudged that plaintiff take

nothing by its suit in this behalf, and that defendant go hence without day and recover of said plaintiff his costs and charges herein expended, for all of which costs and charges let execution issue upon praecipe of said United States district attorney.

In United States District Court

Motion for a new trial

Filed April 8, 1925

Now comes the plaintiff in the above-entitled cause and moves the court to set aside its findings and judgment in the
23 above-entitled cause and to grant a new trial of the issues therein for the following reasons:

1. Because the finding and judgment of the court are contrary to the evidence submitted in the cause.

2. Because under the stipulation and agreed statement of facts and the additional testimony offered on the part of plaintiff the finding and judgment of the court should have been in favor of the plaintiff and against the defendant.

3. Because under the law and the evidence submitted to the court the plaintiff was entitled to recover.

4. Because the court erred in rendering judgment for defendant on the facts as found and stated by the court in its opinion delivered in the cause.

(Signed) EDWARD J. WHITE,
M. U. HAYDEN,
JAMES F. GREEN,
Attorneys for Plaintiff.

In United States District Court

Order overruling motion for new trial

June 12, 1925

Now on this day come the parties in the above entitled cause and submit to the court the motion of plaintiff for a new trial herein; and the court, having considered such motion and being fully advised in the premises, doth order that said motion be, and the same is hereby, overruled.

And now plaintiff files and presents herein its petition praying for the allowance of a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore entered herein against it, together with its assignment of errors on such proposed writ of error; upon consideration whereof it is ordered that a writ of error be, and it is hereby, allowed plaintiff

as prayed upon its giving bond for costs in the sum of five hundred dollars. And now plaintiff presents such bond for costs in the sum of five hundred ($500.00) dollars, which bond is duly approved and filed, and a citation issued and filed, citing and admonishing defendant to be and appear in said United States Circuit Court of *Appeals within sixty days from and after this date.*

24 And upon application of said plaintiff it is ordered that it be, and is hereby, granted sixty days within which to file its bill of exceptions.

In United States District Court

Petition for writ of error

Filed June 12th, 1925

Now comes the above-named plaintiff, Missouri Pacific Railroad Company, and shows to the court that on the 4th day of April, 1925, in this court, a judgment was rendered in the above-entitled cause in favor of the defendant; that on the 8th day of April, 1925, plaintiff filed its motion praying the court to set aside its findings and judgment and to grant plaintiff a new trial in said cause for the reasons assigned in its said motion; that said motion for a new trial was duly submitted to the court and on the 12th day of June, 1925, was overruled and final judgment entered for defendant, and plaintiff avers that in the trial of said cause and the judgment entered therein certain errors were committed to the prejudice and injury of the plaintiff, all of which appear in detail in plaintiff's assignment of errors, which is filed in this cause with this petition for writ of error.

Wherefore, plaintiff prays that a writ of error may issue in its behalf, returnable to the United States Circuit Court of Appeals for the 8th District, for the correction of the errors so complained of and for the reversal of the judgment entered in said cause; that a citation be issued by the court directed to defendant and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the United States circuit court of appeals, and for such further order as may be proper in the premises.

(Signed) MINT U. HAYDEN,
EDW. J. WHITE,
JAMES F. GREEN,
Attorneys for Plaintiff.

To the clerk of this court:

The above petition is granted; let the writ issue as prayed.

_____.
Judge.

In United States District Court

Assignment of errors

Filed June 12, 1925

Now comes the plaintiff in the above cause and presents to the court its assignment of errors, which it alleges were committed in the trial and proceedings in the above cause to its prejudice and injury, as follows:

I

That the court erred in its opinion and judgment in holding that upon the agreed statement of facts which was filed in the cause the judgment should be for defendant.

II

That the court erred in finding that under the stipulation and agreement of the parties as to the facts and the additional evidence offered on the part of plaintiff, that plaintiff was not entitled to recover the amount sued for in its petition, as against defendant.

III

That the court erred in its oral opinion and judgment entered in the cause in holding that under the provisions of the revenue act passed by Congress, known as the "revenue act of 1918," plaintiff was not entitled to recover from defendant the amount sued for in its petition and which it had theretofore paid under protest to defendant.

IV

That the court erred in holding that, under the agreed statement of facts submitted to the court and the additional evidence offered on part of plaintiff, the plaintiff was liable to the United States for the payment of taxes which were sued for in this cause.

V

That under the stipulation as to the facts and the additional evidence offered on part of plaintiff the judgment in the cause should have been for the plaintiff and not for defendant.

VI

That the court erred in overruling the motion for new trial filed by the plaintiff in said cause.

Wherefore, because of the errors hereinabove assigned, plaintiff prays that the judgment entered by the district court in the above cause be reversed and set aside.

(Signed) EDW. J. WHITE,
M. U. HAYDEN,
JAMES F. GREEN,
Attorneys for plaintiff.

26 [Bond on writ of error for $500.00, approved and filed June 12, 1925, omitted in printing.]

27 In United States District Court

Record entry

July 9, 1925

Now on this day comes plaintiff in the above-entitled cause and presents herein its bill of exceptions, which bill of exceptions is duly allowed, signed, and filed.

In United States District Court

Bill of exceptions

Filed July 9, 1925

CAPTION

Be it remembered: That upon the trial of this cause during the September term, A. D. 1924, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, on the thirtieth day of December, 1924, before the honorable Charles B. Faris (a jury having been waived), the following proceedings were had:

APPEARANCES OF COUNSEL

Mr. James F. Green, Mr. Edward J. White, Mr. M. U. Hayden, for plaintiff.

Mr. Claud M. Crooks, Mr. Charles F. Hendler, for defendant.

COLLOQUY BETWEEN COURT AND COUNSEL

The COURT. Has a stipulation been filed waiving a jury?

Mr. GREEN. Yes, your honor.

The COURT. Very well; the case is taken up and submitted to the court, a jury having been waived.

You may state what it is about, Judge Green, or read your petition.

Mr. GREEN. The petition is quite lengthy, your honor, and as considerable portions of it will be read to your honor later on, when

the stipulation as to the facts is offered in evidence. I think that probably I can save time by stating generally the character of the action.

The COURT. Very well; take your own course.

(At this point counsel for plaintiff made his opening statement to the court.)

Mr. CROOKS. The answer is simply a general denial of the petition, if the court please.

28 Thereupon the plaintiff, to sustain the issues in its behalf, offered the following evidence:

Mr. GREEN. Now, for the purpose of the trial of the case, your honor, the parties have agreed on the following stipulation as to facts, which is duly signed, and which I suppose your honor will desire to have read pretty much in full.

Mr. WHITE. I think perhaps the court might like to see a copy of it, so I will hand you this copy.

Mr. GREEN (reading).

[Stipulation of facts omitted; printed side page, ante.]

35 The stipulation is duly signed by counsel, and is offered in evidence.

The COURT. Very well; consider it in.

F. P. JOHNSON, a witness of lawful age, being duly produced, sworn, and examined, testified in behalf of plaintiff, as follows:

Direct examination by Mr. WHITE:

Q. Your name is F. P. Johnson?—A. Yes, sir.

Q. You are the general auditor of the Missouri Pacific Railroad?—A. I am.

Q. How long have you been engaged in the avocation of railroading, Mr. Johnson?—A. Thirty-six years.

Q. Thirty-six years?—A. Yes, sir.

Q. How long have you been employed by the Missouri Pacific Railroad Company?—A. Thirty-six years.

Q. As general auditor of the Missouri Pacific Railroad Company, are the different income taxes for the current years audited and the disbursements authorized to cover them under your supervision?—A. Yes, sir.

36 Q. Did you as general auditor of the Missouri Pacific Railroad Company, during the years from 1920 to January 1, 1923, audit and pass for voucher the bills for income taxes due the Federal Government and war profit taxes?—A. Yes, sir.

Q. As general auditor of the Missouri Pacific Railroad Company, have you made, in line with the performance of your duties, a study of the regulations of the Commissioner of Internal Revenue?—A. Yes, sir.

Q. With reference to the war profit tax, as applicable to commodities of transportation?

Mr. HENDLER. If the court please, I have not heretofore interposed an objection to questions relating to income taxes and war profit

taxes, supposing that it was merely introductory to something else, but I do not see how we are concerned here, in a case involving only transmission taxes, with any questions in regard to income or excess profit taxes.

Mr. WHITE. That objection is perhaps well taken, your honor.

The COURT. Oh, yes; but I will hear it. The objection will be overruled.

Mr. WHITE (to the witness). You may answer, Mr. Johnson.

A. I have.

Q. Have you with you, Mr. Johnson, the regulation of the Commissioner of Internal Revenue, with reference to Federal taxes due upon transportation of a common carrier, including exceptions mentioned in the revenue law, section 500, and subsequent sections?—A. Yes, sir.

Q. Will you produce that and let me have it marked as an exhibit?

The COURT. Really, gentlemen, it is not a question here as to those regulations, nor a question as to the right of the commissioner to make them, but it is a question whether the law means what the commissioner has said that it means. It is a question directed to this court, and to nobody else. Clearly, the commissioner could not make a regulation in a——

Mr. WHITE. No; your honor has held that in another case. I just want to get this in the record.

Q. Mr. Johnson, what is the practice——

57 Mr. CROOKS. I think we have all this in the stipulation, or the portion——

Mr. WHITE. Regulation No. 49 is not in the stipulation.

The COURT. The commissioner, of course, might make a regulation as to the manner of making a return; the form which that return shall take, and provide the necessary blanks and the affidavits, and all that sort of thing, but he could not add one jot or tittle to the terms of that statute, if he were to regulate from now until doomsday. So, the only question here is really a question of whether that statute means, that under this contract and this course of dealing now stipulated, the Government had the right to exact these payments. But proceed; I will hear it.

Mr. WHITE. I think your honor has the situation sized up just as we view it.

Q. Mr. Johnson, from your experience, covering the length of time mentioned, in the railroad business, is the transmission of messages by wire a necessary prerequisite to the successful conduct and handling of trains in the operation of a railroad?—A. Absolutely.

Q. What are the regulations referred to by you, of the Commissioner of Internal Revenue, with reference to a tax upon the transportation made by the common carrier, the railroad company, for the benefit of the Western Union under this contract?

Mr. HENDLER. That is objected to——

The COURT. I do not see the competency of it now, Mr. White.

(Here ensued colloquy between the court and counsel.)

By Mr. WHITE:

Q. Mr. Johnson, you have been familiar with this contract with the Western Union since it was executed in 1911, have you not?—A. Yes, sir.

Q. It embraces the performance of a great many reciprocal acts, does it not—— A. Yes, sir.

Q. Between the two companies?—A. Yes, sir.

Q. The railroad company granted to the Western Union the right to stretch its wires upon their poles, and granted them title to the poles and a certain portion of the right of way?—A. Yes, sir.

38 Q. And they were given the right to operate, for commercial purposes, in the stations of the railroad company?—A. Yes, sir.

Q. The railroad company was to have ten per cent on all business realized from the commercial use of the wires?—A. Yes, sir.

Q. A reciprocal obligation with reference to the transportation of the men and property, in the contract, contained the clause that the railroad company will have the right to the transmission of messages at regular commercial rates, aggregating the sum of seventy-five thousand dollars per year, and the railroad company was to transport the men and property of the telegraph company at regular prices, up to that amount?—A. Yes, sir.

Q. Explain to the court how you kept the accounts of the different parties to that contract, covering the transportation by the railroad company, and the transmission of messages by the Western Union that are to be franked, under that contract.—A. So far as the transportation of men and material was concerned, our office kept a record of all of the transportation furnished to the telegraph company. At the end of the contract year statements were made setting forth the transportation furnished, and those statements were delivered to the Western Union. After they were verified by the Western Union they became the basis for settlement under the contract. A similar arrangement was made by the Western Union Telegraph Company.

Q. After you received the amount of the frank messages which had been sent by the officers and agents of the railroad company, if those messages did not aggregate over seventy-five thousand dollars a year, were there any payments made for those messages?—A. No, sir.

Q. Did the Western Union Telegraph Company, during any of these years involved here, pay the Missouri Pacific Railroad Company for any transportation charges aggregating up to seventy-five thousand dollars?—A. No, sir.

Q. Then, in your method of accounting you utilized the regular transportation charges for the transportation of the railroad company and the Western Union Company simply for the purpose of ascertaining when the aggregate was reached?

Mr. HENDLER. We object to the purpose; we are not concerned with the purpose. Your honor is only concerned with the fact.

39 The COURT. Yes; I will determine the purpose. You may elicit the facts from him, however.

Mr. WHITE. Q. Were there any payments in cash, or its equivalent, actually transferred from the railroad company to the telegraph company within the seventy-five thousand dollar limit?

A. No, sir.

The COURT. Let me understand that, now.

Q. You mean that for none of these years the services rendered by the telegraph company to the railroads, nor the services rendered by the railroads to the telegraph company exceeded seventy-five thousand dollars?—A. No, sir; I don't mean that. I mean that no payments were made up to seventy-five thousand dollars. The only payments made were those in excess of seventy-five thousand dollars.

Q. I understand that, but I thought you had said that for the years involved here no payments were necessary, because it did not amount to seventy-five thousand dollars. Did it amount to more than that?—A. Yes, sir.

The COURT. Very well.

Mr. WHITE. You have a statement, Mr. Johnson, have you not, of the extent of the transportation for these years?

A. I have.

Q. I will have that identified, and you can then explain that. We will mark that "Plaintiff's Exhibit No. 1." (See last page.)

The COURT. Can we not agree upon that, that for a certain year the excess over seventy-five thousand dollars was in favor of the telegraph company, or the railroad company, as the case may be, and amounted to so many dollars? That is all I have to know.

Mr. WHITE. He has the statement right there.

Mr. HENDLER. We have tried to stipulate everything that was before us——

The COURT. I thought perhaps we might greatly shorten it. It may not become pertinent to know that, but on the other hand, it might be, on the theory that if you did not get all your credit in there might be a reduction one way or the other.

40 Mr. WHITE. For the years covered by the taxes here, what was the extent of the business handled by both the Western Union and the Missouri Pacific Railroad Company?

A. For the contract year ended August 31, 1920, the total amount of business handled by the Missouri Pacific Railroad Company for the Western Union amounted to $81,165.28.

Q. That was business that the Missouri Pacific transported for the Western Union?—A. Yes, sir. After this statement was submitted to the Western Union they made adjustment in it amounting to $443.56, so that the net amount of business handled for the Western Union for that year was $80,721.72, or $5,721.72 in excess of the seventy-five thousand dollar allowance under the contract. During the same year the amount of business handled by the Western Union for the Missouri Pacific Railroad Company was $71,815.17. That was $3,184.83 less than the amount provided for under the contract.

and for that year there was no payment made by the Missouri Pacific to the Western Union Telegraph Company.

Q. How is the next year?—A. The year ending August 31, 1921, the net amount of business done by the railroad company for the telegraph company was $144,023.95. This was $69,023.95 in excess of the seventy-five thousand dollars. During the same year the business handled by the telegraph company for the railroad company amounted to $86,221.92, or $11,221.92 in excess of the contract allowance. During that year the Western Union Telegraph Company paid the railroad company the difference between $69,023.95 and $11,221.92, or $57,802.03.

Q. Does that bring it down to January 1st?—A. No, sir. For the year ended August 31, 1922, the net amount of business handled by the railroad company for the telegraph company was $132,349.02, or $57,349.02 in excess of the contract; while the amount of business handled by the telegraph company for the railroad was $83,342.17, or $8,342.17 in excess of the contract. And that year the telegraph company paid the railroad company the difference between $57,349.02 and $8,342.17, or $49,006.85. That brings us down to the contract year ending August 31, 1922.

Q. Mr. Johnson, has the Government collector of internal
41 revenue ever made any demand upon the railroad company for taxes due upon any transportation service rendered to the Western Union Telegraph Company?

Mr. HENDLER. That is objected to. We are not concerned here with the taxes on the other end of this transaction. This is a suit to recover for the transmission taxes.

The COURT. I understand the question has reference to whether the collector has tried to collect from the Western Union now what I may call a reciprocal tax?

Mr. WHITE. Yes.

The COURT. I do not think that has anything to do with it.

(Here ensued colloquy between the court and counsel.)

The COURT. I shall overrule the objection and hear it.

To which ruling of the court the defendant, by his counsel, then and there at the time duly executed.

By Mr. WHITE:

Q. Read the regulation of the Commissioner of Internal Revenue with reference to the exception of the Government tax put upon transportation rendered by common carriers to other common carriers and to telegraph companies.—A. This exception is embodied in Regulation No. 49, issued by the Internal Revenue Department in 1920. Section 501, article 46, paragraph C, shown on page 27 of the printed pamphlet: "If a telegraph or telephone line or lines along the line of any railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company under contract transports commodities necessary to maintain or operate such telegraph or telephone

line or lines along the line of such railroad company, such commodities being intended to be or having been so used, and the railroad company makes no charge for such transportation, the charges which, but for such arrangement, would have accrued upon such transportation, are exempt from the tax."

Q. Now, Mr. Johnson, similar contracts to that obtaining here you know from your general information as an auditor for so many years are made by the Western Union Telegraph Company with all the railroad companies in the United States or a great many
42 of them?—A. I know that there are similar contracts to ours made with other railroad companies.

Mr. WHITE. You may inquire.

Cross-examination by Mr. HENDLER:

Q. This statement, I notice, Mr. Johnson, is rendered in dollars and cents?—A. Yes, sir.

Q. The statements are mutually rendered by the telegraph company and the railroad company. Now that, I take it, in each case represents the usual and ordinary charges, on the one hand, of the railroad company for transportation of passengers and commodity transportation and, on the part of the telegraph company, of its tariff rates?—A. It does.

Q. The railroad company appears to have been the fortunate contractor during these years?—A. The business of the railroad company exceeds the business of the telegraph company.

Mr. HENDLER. I believe that is all.

The COURT. I want to ask if it is not a fact that during the period embraced in the suit here there was a tax levied on passenger tickets and freight——

Mr. WHITE. Yes.

Mr. HENDLER. Yes, your honor.

The COURT. That was what I had reference to a moment ago when I used the word "reciprocal."

Mr. HENDLER. There is another point that might give your honor some concern when you come to consider the case. I thought you had that in mind when you started to speak. None of this tax covers the period when the railroads were in the hands of the director of railroads. It begins with March of 1920, the date when the railroads were returned to their owners.

The COURT. The first day of March, 1920, when the transportation act took effect?

Mr. HENDLER. No; but it was then the railroads were turned back to the corporations by the director.

The COURT. I get that.

43 Mr. HENDLER. So your honor need not concern yourself at all as to that question of Government control and operation.

The COURT. Very well. Is there any further evidence?

Mr. HENDLER. No; that concludes the evidence.

Which was all of the evidence offered at the trial.

Thereupon counsel made their oral arguments to the court, and the case was submitted to the court and by the court taken under advisement, counsel for the respective parties being permitted to file briefs if they so desire.

MEMORANDUM OPINION, APRIL 4, 1925

FARIS, J.: This case was heretofore submitted to the court, sitting as a jury (waiver of a jury having been formally made by stipulation), upon an agreed statement of facts, plus certain oral evidence, that it was agreed might be offered by either side. Some such evidence was offered by the plaintiff. But this oral evidence, in my opinion, was not such as to change or alter the evidentiary situation therefore created by virtue of the stipulated facts.

I therefore find the facts to be as set out in the agreed statement of facts, and upon these facts I conclude, as a matter of law, that the judgment should be for defendant and against plaintiff; that plaintiff take nothing by its said suit herein, and that defendant go hence without day.

So much is ruled in order to form if possible a legal basis for review, if plaintiff is so advised, absent, as here, any other requested method of procedure.

Having performed this duty to the extent stated, I think that some hasty expression, at least, of my views ought, in candor,
44 to be set out so that counsel may be afforded the legal reasons held in mind for the bald conclusion thus announced.

The petition in the case is in two counts. The first count asks for a return or refunding of $10,036.85, paid under protest by plaintiff to the defendant as collector of internal revenue of the United States for the first district of Missouri, for taxes on messages sent by plaintiff on Western Union Telegraph Company franks between the first day of March, 1920, and the first day of July, 1922.

The second count is in all respects similar, except that it prays the refunding and return of the sum of $4,756.10 paid under protest for taxes on similar messages sent by plaintiff between the first day of August, 1922, and the first day of January, 1923.

The statutes which control are sections 500, 501, and 502 of the revenue act of 1918, and sections 500, 501, and 502 of the revenue act of 1921. The difference between the two acts are perhaps such as to affect in no substantial way the law of the case, although sections 500, 501, and 502 of the revenue act of 1918 were wholly repealed by the act of 1921. By this repeal subdivision (c) of section 501 was eliminated from the statute and it does not apply, therefore, to so much of the taxes collected as were bottomed on messages sent after January 1, 1922. But I am not able to construe subdivision (c) of said section 501 of the act of 1918 as at all applicable to the facts in this case. The words "commodity" and "material" as used in said subdivision (c) in my opinion include goods, wares, merchandise, or freight commonly so called only in contradistinction

to telephone and telegraph conversations and messages. Even if this view were not fully sustained by the language used and the context in which this language is found, and I think it is, great weight is lent to it by the fact that subdivision (c) of section 501 was repealed when the taxes on freight and express shipments were repealed, as they were by the act of 1921.

Upon the agreed facts subdivision (c) of section 501 of the act of 1918 applied in no event to but a part only of the taxes mentioned in the first count and to none of those mentioned in the second count. I construe this language as not applying at all to the facts before me, and so no further attention need be given to it.

45 The plaintiff, on October 24, 1911, and long before the passage of the revenue act of 1918, made a contract with the Western Union Telegraph Company whereby, up to the sum of seventy-five thousand dollars per year, the telegraph company agreed to transport on franks telegraph messages, on or off line, for the plaintiff, in and about plaintiff's business as a common carrier. In consideration for this service the plaintiff agreed to transport freight and passengers for the telegraph company by franks and free passes up to the amount of seventy-five thousand dollars per year.

For all services rendered by either party to the other, above the value of seventy-five thousand dollars per year, payments are, by the terms of this contract, reciprocally exacted in cash. For all the years involved here the telegraph company has paid, in cash, to the plaintiff substantial sums for services rendered by it in carrying freight and passengers, whereof the sum of the rates and fares exceeded seventy-five thousand dollars per year.

As forecast, all messages sent and all freight and passengers carried by plaintiff and the telegraph company were charged for and accounted for, but no payments were actually exacted or made, except for sums in excess of seventy-five thousand dollars per annum. These charges were bottomed on the usual rates charged to the public generally. If there were no rates to govern, the actual cost of the service, plus not more than twenty-five per cent, was charged.

Upon these facts plaintiff contends that section 500 of the revenue act of 1918, which, as said, is substantially similar to section 500 of the act of 1921, either has no application or, by said section and others mentioned, it is exempted from taxes.

This section, so far as pertinent, provides thus:

"Section 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the tax imposed by section 500 of the revenue act of 1917 • • • (f) In the case of each telegraph, telephone, cable, or radio dispatch, message, or conversation, which originates on or after such date, within the United States, and for the transmission of which the charge is more than fourteen cents and not more than fifty cents, a tax of five cents; and if the charge is more than fifty cents, a tax of ten cents; provided, that only one payment of such tax shall be required,

46 notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

(g) A tax equivalent to ten per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit or special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the public press or (2) in the conduct by a common carrier or telegraph or telephone company of its business as such."

All of the taxes here sought to be recovered by the plaintiff were exacted by defendant under the provisions of subdivision (f), supra, and accrued, as to the sum total of the taxes levied on the messages, as per the rates in such subdivision provided. If the plaintiff had made a contract with the telegraph company by which it leased wires of the latter upon a rental basis, then it may well be that the tax of ten per cent levied by subdivision (g) in such case would not apply. But by the very terms of the latter subdivision both the taxes and the exemptions therein provided for are confined to that subdivision only and the taxes here in dispute did not accrue under subdivision (g).

The result is that if plaintiff is included as taxable upon the agreed facts when the provisions of subdivision (f), supra, are applied to these taxes, then I am forced to the view that there are no provisions exempting plaintiff from such payment by reason of the fact that it is a common carrier and telegraph service is necessary for the carrying on of its business as such.

All, then, that is left of the case is the question of whether the agreed facts bring the plaintiff within the provisions of subdivision (f) of section 500 of the revenue act of 1918.

Clearly, plaintiff got this service, and for this service the usual charge was made by the telegraph company; or, to put it another way, an account was kept of the service, based upon the usual charge therefor, which the public would have had to pay. Plaintiff did not pay cash or in money for this service, at least up to the sum of a total of seventy-five thousand dollars, but it paid in kind; that is, it rendered freight and passenger transportation service to the telegraph company in exchange for telegraphic service rendered
47 by the latter, until the plaintiff had thus swapped or bartered with the telegraph company seventy-five thousand dollars' worth of service. Above this amount of credit or of service to be paid for in service the transactions on the part of both companies with each other were in effect in no wise different from similar sales of service by either company to the general public.

Below the annual sum total of seventy-five thousand dollars, the transaction as said was one of barter, or mutual swapping of service. Of course, a situation could have arisen wherein the plaintiff would have been the loser, because it paid in kind for more service than it got. If, for example, plaintiff had carried for the telegraph

company in any one year freight and passengers the carriage of which, at the usual rates and fares, amounted to seventy-five thousand dollars, while it only sent on its own affairs telegraph messages amounting to fifty thousand dollars, say, it would have paid a largely excessive rate for these messages, and would have sustained a loss of twenty-five thousand dollars. This, as it happened, never occurred at any time within the period embraced in this controversy; but, of course, it could have happened. The moment the credit of seveny-five thousand dollars was exhausted, the transactions, as has been seen already, differed in no substantial way from sales of service, by either company, to the general shipping and traveling public, except, it may be assumed, the latter paid cash at or before the rendition of the service, while plaintiff either paid, or was paid, at the end of the contract year. Since such services were thus mutually paid for to each other by the plaintiff and the telegraph company, does the fact that such payments were, within limits, made in kind, by a swapping of service, prevent them from being services rendered for hire within the purview of subdivision (c) of section 501 of the revenue act of 1918, by which part of this case is governed? I do not think so.

Congress might have exempted from taxes such service so compensated, but I am not able to see that it actually did so. Nor does the fact that under the contract here a situation could have arisen (but, fortuitously, did not in this case), wherein the plaintiff might have rendered much service for which it got no pay, serve to render the plaintiff exempt from taxes, or to take it out of the provisions of subdivision (f) of section 500. This, I think, is obvious, for the reason that the agreed amount of seventy-five thousand dollars' worth of free service, or bartered service, is merely arbitrary,
48 and if the fact that the mere fixing of an arbitrary amount of free service could serve of itself alone to take plaintiff out of the statute, the anomalous situation would present itself whereby plaintiff, by a mere contract with another carrier, would be able to avoid the payment of taxes to the Government. Certainly the Congress could not have intended to have put it in the hands of plaintiff to become a taxpayer or not a taxpayer, according to the terms of a bad contract which plaintiff might enter into.

I reach this conclusion without definite reliance upon the case of Telegraph Company vs. Delaware, etc., Railroad Company, 282 Fed. 925, wherein substantially a similar view was taken; as, also, without any reliance upon the regulations adopted and promulgated by the Commissioner of Internal Revenue in Regulation No. 57, which regulation is set out in the agreed statement of facts.

If a fair legal construction of these statutes which are involved here does not bring the plaintiff into the category of those from whom taxes are exacted, then, of course, it is elementary that no regulation of the Commissioner of Internal Revenue would serve to perform this office. In short, the Commissioner of Internal Rev-

enue has no power, by a mere regulation, to make plaintiff's transactions taxable if they are not taxable by the statute itself. But if the Commissioner of Internal Revenue has by this regulation correctly construed these statutes, then the fact that he did so by language a little less involved and cryptical, and more easily understood than the statutes themselves, does not serve to make this regulation bad.

I am compelled, therefore, against views tentatively held upon argument of the case, to agree that plaintiff is taxable; that the taxes paid were legally exacted, and that it ought not to recover. The finding and judgment, therefore, will be for defendant, as already said in the finding of fact and conclusion of law.

This oral opinion may be filed by either party in the case, and exceptions are allowed to plaintiff, both to the views expressed herein, as well as to the conclusions of law and fact with which I began.

ST. LOUIS, MISSOURI, *April 4, 1925.*

49 JUDGMENT

In accordance with the above finding the court entered judgment in favor of defendant, to which finding and judgment plaintiff at the time duly excepted.

And thereafter, to wit, on the eighth day of April, 1925, plaintiff filed its motion for new trial, which motion is in words and figures as follows, to wit:

[Motion for new trial, omitted; printed side page, ante.]

MINUTE ENTRY OF ORDER OVERRULING MOTION FOR NEW TRIAL

And thereafter, to wit, on the twelfth day of June, 1925, the foregoing motion for new trial was by the court overruled, to which action of the court the plaintiff, by its counsel, then and there, at the time, duly excepted.

50 In United States District Court

Order settling bill of exceptions

Forasmuch, as said matters do no appear of record herein, the plaintiff has prepared and now presents this, its bill of exceptions, and prays that the same may be signed, sealed, and made a part of the record, which is accordingly done on this 9th day of July, 1925.

(Signed) C. B. FARIS, [SEAL.]
Judge, Eastern Division of the Eastern Judicial District of Missouri.

Approved by:
(Sgd) CLAUDE M. CROOKS,
Counsel for Defendant.

51-52 PLAINTIFF'S EXHIBIT 1

Missouri Pacific Railroad Company—Yearly settlements with Western Union Telegraph Co. under record #8350 effective September 1, 1911

Year ended	Mo. Pac. Bills vs. Western Union for transportation charges	Western Union counter-billing vs. Mo. Pac.	Net transportation charges	Annual allowance provided by contract	Excess transportation charges	Western Union telegraphing charges vs. Mo. Pac.
Aug. 31, 1920	$91, 165. 28	$443. 56	$90, 721. 72	$75, 000. 00	$5, 721. 72	$67, 443. 38
" " 1921	147, 127. 51	3, 103. 56	144, 023. 95	75, 000. 00	69, 023. 95	96, 221. 93
" " 1922	141, 275. 70	8, 924. 68	132, 349. 02	75, 000. 00	57, 349. 02	83, 343. 17

Year ended	Allowances in A. R. T. Co.	Total telegraphing charges	Annual allowance provided by contract	Excess telegraphing charges	Bills versus Western Union covering difference excess telegraphing and excess transportation		Date paid
Aug. 31, 1920	$6, 371. 79	$71, 815. 17	$75, 000. 00	$3, 184. 83	31453-23	$5, 721. 72	July 26, 1923
" " 1921		96, 221. 93	75, 000. 00	11, 221. 93	111529-22	57, 903. 05	Apr. 14, "
" " 1922		83, 343. 17	75, 000. 00	8, 343. 17	160771-23	49, 000. 85	Oct. 15, "

War tax paid under protest:

March, 1920, to July, 1922	$10, 036. 85
Aug., 1922, to Jan., 1923	4, 756. 10
	14, 792. 95
Penalty	50. 00
	14, 842. 95

ACCOUNTING DEPARTMENT,
ST. LOUIS, MO., *December 20, 1924.*

53 In United States District Court

Praecipe for transcript of record

Filed July 20, 1925

To James J. O'Connor, clerk, United States District Court:

You are hereby notified that the plaintiff in the above-entitled cause, in which a writ of error has been issued to the United States Circuit Court of Appeals for the 8th Judicial Circuit, desires to file in said Court of Appeals a typewritten or manuscript transcript containing the following documents and proceedings in said cause, to wit:

1. Petition.
2. Answer.
3. Stipulation waiving jury.
4. Bill of exceptions showings proceedings in trial of the cause.
5. Record entries of judgment; order overruling motion for new trial; order granting writ of error; order granting time to file bill

of exceptions and order showing filing of same; and order approving bond.

6. Petition for writ of error.
7. Assignment of errors.
8. Writ of error and your return to same.
9. Citation.
10. Bond.
11. Praecipe for transcript and certificate of clerk to transcript.

You are further notified that plaintiff elects to have transcript of the record printed under the supervision of the clerk of said Court of Appeals, under its rules, and requests that you make and have filed in said Court of Appeals said transcript here requested, in accordance with the rules of said Court of Appeals.

(Signed) EDW. J. WHITE,
M. U. HAYDEN,
JAMES F. GREEN,
Attorneys for Plaintiff.

54 Copy of above praecipe received July 20th, 1925.
(Signed) CLAUDE M. CROOKS,
Atty. for Deft.

[Clerk's certificate to foregoing transcript omitted in printing.]

55 [Appearances of counsel omitted in printing.]

56 [Minute entry of argument and submission Jan. 22, 1926, omitted in printing.]

57 In United States Circuit Court of Appeals, Eighth Circuit

No. 7129—December term, A. D. 1925

MISSOURI PACIFIC RAILROAD COMPANY, plaintiff in error vs. ARNOLD J. HELLMICH, UNITED STATES collector of internal revenue, defendant in error	In error to the District Court of the United States for the Eastern District of Missouri

Mr. James F. Green and Mr. Edward J. White (Mr. M. U. Hayden on the brief), for plaintiff in error.

Mr. Charles T. Hendler, special attorney, Internal Revenue (Mr. Allen Curry, U. S. attorney, Mr. Claude M. Crooks, assistant U. S. attorney, and Mr. A. W. Gregg, Solicitor of Internal Revenue, on the brief), for defendant in error.

Before STONE, VAN VALKENBURGH, and BOOTH, Circuit Judges.

Opinion

Filed April 28, 1926

VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

The revenue act of 1918, among other things, provided:

"Sec. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by section 500 of the revenue act of 1917:

* * * * * * *

58 "(f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents; provided, that only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation.

"Sec. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * * * *

"(c) The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. * * * Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

* * * * * * *

"The returns required under this section shall contain such information and be made at such times and in such manner as the commissioner, with the approval of the secretary, may by regulation prescribe."

The Commissioner of Internal Revenue prescribed the following regulations deemed pertinent to this inquiry. Article 9 of Regulations Numbered 57:

"Messages transmitted under contract.—Where by contract a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500-f of the act). The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary cus-

tomers, calculated at the regular fixed rate provided in the
59 tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of the common carrier and whether they are 'on-line' or 'off-line' are immaterial. Thus a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business 'free,' and all such messages over its lines off the railroad line 'free' to an amount not exceeding ten thousand dollars ($10,000.00) per year, calculated at its regular rates, and all messages over that amount at half rates in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether 'on-line' or 'off-line' and whether 'free' or at half rates, are subject to the tax provided by this section (500-f) of the act. The tax must be computed, collected, and paid upon each such message."

Regulation No. 49, issued by the Internal Revenue Department in 1920:

"If a telegraph or telephone line or lines along the line of any railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company, under contract transports commodities necessary to maintain or operate such telegraph or telephone line, or lines, along the line of such railroad company, such commodities being intended to be, or having been so used, and the railroad company makes no charge for such transportation, the charges which, but for such arrangement, would have accrued upon such transportation, are exempt from the tax."

On the 24th day of October, 1911, the Western Union Telegraph Company and the predecessors of plaintiff in error, all common carriers engaged in interstate commerce and subject to the act of Congress to regulate interstate commerce, entered into a written contract, the material parts of which are as follows:

"The telegraph company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroad covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, to be authorized by frank permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company to be issued to such officers and agents of the railway com-
panies as may be designated by their presidents or general
60 managers; and the railway companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the telegraph company may require for its employes, supplies, and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews, and equipment for distribution service, and outfit, boarding, and tool cars for work on the lines along said railroads whenever required by the telegraph company. The transportation of employes to be author-

ized by passes to be issued by the railway companies on request of the superintendent or other authorized officer of the telegraph company.

"Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of service rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty-five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during the year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that, in the event that each of the parties hereto is rendered bills for such services in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000, there shall be no payment by either party to the other therefor."

This contract was in full force and effect between plaintiff in error and the telegraph company at the time of the enactment of the revenue act of 1918, to which reference has been made.

The interstate commerce act which forbids any common carrier subject to its provisions, directly or indirectly, by any special rate, rebate, drawback, or other device, to charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered than it charges, demands, collects, or
61 receives from any other person or persons, for a like service, provides further that, "nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services." Section 8569, Compiled Statutes of the United States, 1916.

The arrangement made by the contract of October 24, 1911, although an apparent departure from the provisions of the original act against granting special rates or charges, was thus recognized by Congress and approved by the Supreme Court, for the reason that the interdependence of such companies is very intimate. The railroads and the telegraph companies have grown together in mutual dependence; each is necessary to the other. The bargain between them is a very complex one and all the benefits derived on one side, including those of a pecuniary nature, form the consideration for all the benefits conferred upon the other. Postal Tel.-Cable Co. v. Tonopah R. R. Co., 248 U. S. 471.

Defendant in error made demand upon plaintiff in error in May and June, 1923, for taxes claimed to be due on account of franked

Western Union messages transmitted during the period from March, 1920, to January, 1923, inclusive, aggregating $14,792.95. These taxes covered all messages sent, including the free service provided by the contract. Plaintiff in error paid these sums under protest, the sufficiency of which is conceded, and thereafter, in March, 1924, brought suit for the recovery thereof. It is agreed that plaintiff in error duly appealed to the Commissioner of Internal Revenue for refund, and that the commissioner failed to render any decision or make any response to such appeal for more than six months after the same was presented to him. It is further agreed that if the court should find for the railroad company, judgment should be rendered in its favor for the sums claimed, to wit, $14,792.95. Upon submission to the court, on stipulation of parties waiving a trial by jury, a judgment was rendered in favor of defendant in error.

Plaintiff in error urges that the revenue act of 1918, and the interstate commerce act above quoted are in pari materia, and that the latter should be considered as governing the application of the former. To this we cannot agree, because the two acts do not deal with the same subject-matter. The parties are the same, but the subject matter in the one case is taxation--in the other, a regula-
62 tion and control of carriers. The latter act differentiates carriers from ordinary shippers permitting contracts for exchange service. The language of this court in United States v. Railroad, 157 Fed. 321, is conclusive upon this question. Nevertheless the commerce act is instructive and pertinent as revealing the attitude of the Government toward contracts of this nature.

We also agree with the trial court that Regulation No. 57 has no force as creating a tax. That regulation is powerless to enlarge the act. We may also concede the general rule that long interpretation of a statute by an executive department charged with its enforcement is entitled to weight, and that under some circumstances a subsequent enactment without change has been held to indicate approval of prior administrative construction and interpretation; but this rule would apply equally to Regulation No. 49, whereby the telegraph company is, by interpretation, exempted from tax where the railroad company, under contract, transports commodities necessary to maintain or operate such telegraph lines along the line of the railroad company, on the ground that the railroad company makes no charge for such transportation. In this respect, in our opinion, the interpretations disclosed by these two regulations are inconsistent. In this view, it is improbable that Congress had this feature in mind at all when it passed the later act of 1921, for certainly it can not be said that the railroad did not charge for the transportation in the same sense as the telegraph company did for the messages. The situation presented is similar to that before the Supreme Court in George Iselin v. United States, decided March 1, 1926, — U. S. —, in which it was held that such departmental construction can not be given the force and effect of law.

The real question is, did these messages upon which the tax was based come within the intendment of subdivision (f) of section 500 of the act of 1918? If we adhere strictly to the technical meaning of the language used, we might answer in the affirmative; but this law, as all others, must be construed in the light of the true intent, object, and purpose of the legislation. It was not intended thereby to tax any service of this kind which was not rendered for hire; that is to say, for a return either in money or property. In other words, the term charge as used in the act is not a mere bookkeeping term. It means a return in tangible value, measured in money, according to the nature, length, and destination of the message. It is so used in Regulation 49. When we say "we make no charge" we mean "we exact no payment."

63 This contract contemplated no payment at all for mutual services up to $75,000. The payments contemplated were upon the excess, or balance of excess, above $75,000. The charge on the books, in terms of dollars and cents, as applied to individual messages (and, of course, corresponding charges were made on the books of the railroad company for transportation furnished), was simply to keep a record for the purpose of ascertaining whether any chargeable excess should come into existence against either party to the contract. This appears from the annual settlements made. For the year ending August 31, 1920, the net transportation charges of the railroad against the telegraph company were $80,721.72. The total telegraphic charges for services furnished by the Western Union Company were $71,815.17. The excess of transportation charges over the free carriage allowed up to $75,000 was $5,721.72; but the excess of railroad service over telegraph service was $8,906.55. If the whole volume of service was subject to payment, settlement being made on general balances, the railroad should have demanded and received $8,906.55, but instead, in accordance with the terms of the contract, it received but $5,721.72. In other words, on each side, service up to $75,000 was free to be used or not used as desired. There was no purpose to charge for it. The fact that where mutual services were actually rendered in excess of $75,000 an appearance of payment, dollar for dollar, is presented, furnishes no controlling guide to ascertainment of the nature of the transaction. The consideration in this contract was not the reciprocal services themselves, on an established tariff basis, but the privilege or option to receive $75,000 worth of free service, should either or both so elect. If each party was, in effect, to charge at the tariff rates for all services without franking privileges, no contract would have been necessary.

This contract was made in 1911 before either the war or this war tax was thought of. It is in no sense self-serving nor designed to defeat the revenue. As said in Postal Telegraph-Cable Company v. Tonopah R. R. Company, supra, contracts of this nature have been nearly universal for fifty years. The apprehension that they can be employed at will to accomplish immunity from taxation is groundless. When the act was passed Congress could have expressly pro-

vided against such a result if it had been deemed necessary, or if such abuse should creep in, it can at any time be met by appropriate legislation. The trial court was admittedly in doubt on the
64 question. It was finally controlled by the view that the contract involved a swapping of services, which, therefore, were for hire; but the contract up to $75,000 was a swapping of privilege rather than of service, and the mutual service up to that limit was free. This is demonstrated by the contemplated operation. If the railroad had handled no shipments for the telegraph company, but had sent messages not exceeding $75,000 in value, it would have paid nothing, and the telegraph company would have received nothing, although the latter would have rendered $75,000 worth of service and would have charged that amount on its books. The Government seeks to convert a mere bookkeeping fiction into an item of income; but this is not permissible. The transaction must be viewed in its substantial and not in its purely technical aspect. Messages up to the amount of $75,000 did not constitute services rendered for hire, and are, therefore, exempt; those in excess of that amount are subject to tax. The case is reversed and remanded with directions to apply this rule. It is so ordered.

65 In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted.]

Judgment

April 28, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, reversed with costs; and that the Missouri Pacific Railroad Company have and recover against Arnold J. Hellmich, United States collector of internal revenue, the sum of ——— dollars for its costs in this behalf expended, to be collected according to law.

And it is further ordered and adjudged that this cause be, and the same is hereby, remanded to the said district court, with directions to apply the rule announced in the opinion of this court that messages under the contract between the Western Union Telegraph Company and the railroad company up to the amount of seventy-five thousand ($75,000.00) dollars did not constitute services rendered for hire and are, therefore, exempt, and those in excess of that amount are subject to tax.

66 [Clerk's certificate to foregoing transcript omitted in printing.]

1Y Supreme Court of the United States

Order allowing certiorari

Filed October 18, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

○

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. —

ARNOLD J. HELLMICH, UNITED STATES COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of Arnold J. Hellmich, as United States Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled cause on April 28, 1926 (R. 62), reversing the judgment of the United States District Court for the Eastern District of Missouri (R. 22).

Question presented

Are telegraph services or facilities rendered to the Missouri Pacific Railroad Company by the Western Union Telegraph Company, and in return for which the railroad company rendered transportation and other services to the telegraph company under the terms of a contract for the mutual exchange of services, taxable under the provisions of Sections 500(f) and 501(a) of the Revenue Act of 1918, and Sections 500(a) and 501 of the Revenue Act of 1921?

Statement

This action was brought in the United States District Court for the Eastern District of Missouri to recover taxes in the amount of $14,792.95, paid under protest on the transmission of telegraph messages during the period from March, 1920, to January, 1923, inclusive, under a contract between respondent and the Western Union Telegraph Company providing for the mutual exchange of services. This contract, in substance, provides that the services performed by each party are to be charged for on the books of the companies and at the end of the contract year bills rendered each party by the other, but no payment in money is to be made by the parties to one another except upon the excess, or balance of excess, above $75,000 worth of services received by either party. (R. 15–17.)

It is the contention of the Government that the telegraph services rendered respondent, whether within the maximum allowance of $75,000 or in excess thereof, were paid for by transportation and other services which respondent in turn rendered the telegraph company, and therefore that the telegraph messages so transmitted were taxable under the provision of Sections 500(f) and 501(a) of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1057, 1101, 1102) and Sections 500(a) and 501 of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227, 284).

The District Court gave judgment for the Government. (R. 22.) Upon writ of error (R. 2) this judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit (R. 62), which held that only those telegraph messages in excess of the contract allowance of $75,000 were subject to tax.

For the language of the statutes and the contract involved, and a more detailed statement of the facts, reference is made to the supporting brief included herein.

Reasons for granting the petition

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court and in holding that telegraph messages up to the amount of $75,000 provided in the contract between respondent and the Western Union Telegraph Company were not taxable under the provisions of Sections 500(f) and 501(a) of the Revenue Act of 1918,

and Sections 500(a) and 501 of the Revenue Act of 1921.

2. The decision of the Circuit Court of Appeals is contrary to the decisions of the United States District Court for the Southern District of New York in *Western Union Telegraph Company* v. *Delaware, Lackawanna and Western Railroad Company*, 282 Fed. 925, and *Delaware, Lackawanna and Western Railroad Company* v. *Bowers*, unreported to date, but printed in the appendix to the supporting brief herein, both of which cases presented the same question involved in the case at bar.

3. The principle involved is one of great public importance and of importance to the Government in the administration of the revenue laws. Suits to recover taxes collected under a similar state of facts are now pending in various District Courts throughout the country, and a large number of claims for refund are also pending in the Treasury Department. If the decision of the Circuit Court of Appeals remains unreversed a great number of additional claims will be filed and a great number of additional suits brought for the recovery of taxes so collected. The Treasury Department estimates that very large sums of money are dependent upon the final decision of the principle here involved.

Wherefore, it is respectfully submitted that the petition for writ of certiorari to review the judg-

ment of the Circuit Court of Appeals for the Eighth Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

BRIEF IN SUPPORT OF PETITION

Opinions of the courts below

The opinion of the District Court has not been reported, but will be found at page 43 of the transcript of record. The opinion of the Circuit Court of Appeals for the Eighth Circuit has not been reported, but will be found at page 56 of the transcript of record.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on April 28, 1926. (R. 62.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (Ch. 229, 43 Stat. 936.)

The facts

This action was brought to recover the sum of $14,792.95, taxes paid by the respondent on the transmission of telegraph messages for it by the Western Union Telegraph Company during the period from March, 1920, to January, 1923, inclusive. (R. 20, 21.)

The telegraph messages for the transmission of which these taxes were assessed and collected were

transmitted under the terms of a contract between the respondent and the Western Union Telegraph Company for the mutual exchange of services, dated October 24, 1911, the fourth paragraph of which reads as follows (R. 15–16):

> Fourth. The Telegraph Company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroads covered by this agreement, as the Railway Companies may desire, for messages pertaining to their railroad business, to be authorized by franks permitting all classes of messages and telegraphic letters in public use on the lines of the Telegraph Company, to be issued to such officers and agents of the Railway Companies as may be designated by their Presidents or General Managers; and the Railway Companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the Telegraph Company may require for its employees, supplies and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews and equipment for distribution service, and outfit, boarding and tool cars for work on the lines along said railroads, whenever required by the Telegraph Company. The transportation of employees to be authorized by passes to be issued by the Railway Companies on request of the Superintendent or

other authorized officer of the Telegraph Company.

Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of services rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty-five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during such year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that, in the event that each of the parties hereto is rendered bills for such services in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000, there shall be no payment by either party to the other therefor.

The account between respondent and the telegraph company for the years covering the period in suit shows that the accounting was in terms of dollars and cents; that for 1921 and 1922 both parties to the agreement exceeded the maximum of $75,000, and that for 1920 the services rendered to the telegraph company by respondent exceeded the maximum, while the services rendered by the telegraph company for respondent were below the maximum. (R. 51.)

The Commissioner of Internal Revenue, under the provisions of Sections 500(f) and 501(a) of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1057, 1101, 1102) and Sections 500(a) and 501 of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227, 284) assessed taxes on all the telegraph messages transmitted under the terms of the above-quoted contract. Payment was made under protest, and upon the failure of the Commissioner of Internal Revenue to act upon a claim for refund within six months after it was filed (R. 21, 22) this action was brought in the United States District Court for the Eastern District of Missouri for the recovery of the taxes so paid.

The District Court gave judgment for the Government (R. 22), on the ground that although the railroad company did not pay in money for telegraph messages up to $75,000, yet it paid in kind by the services which it in turn rendered for the telegraph company. Upon writ of error (R. 2) this

judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit (R. 62), on the ground that "the contract up to $75,000 was a swapping of privileges rather than of service, and the mutual service up to that limit was free." It accordingly held that telegraph messages up to the amount of $75,000 are exempt and those in excess of that amount are subject to the tax.

Statutes involved

Sections 500(f) and 501(a) of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1057, 1101, 1102), reenacted as Sections 500(a) and 501, respectively, of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227, 284) provide:

> SEC. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—
>
> * * * * *
>
> (f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided,* That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the

transmission of such dispatch, message, or conversation;

* * * * *

SEC. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

Paragraph (c) of Section 501 of the Revenue Act of 1918, also deemed pertinent, provides in part:

> The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. * * *

Pursuant to the authority vested in him by the above revenue acts, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated Article 9 of Regulations No. 57 of the Treasury Department, which provides that—

> Where, by contract, a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500(a)) of the act. The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to

whether such messages relate to the operation of the business of a common carrier and whether they are " on line " or " off line " are immaterial. Thus, a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business " free " and all such messages over its lines off the railroad lines " free " to an amount not exceeding $10,000 per year calculated at its regular rates, and all messages over that amount at half rates, in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether " on line " or " off line," and whether " free " or at half rates, are subject to the tax provided by this section (500(a)) of the act. The tax must be computed, collected, and paid upon each such message.

Specification of error to be urged

The error which petitioner urges as ground for the granting of the writ of certiorari and for the reversal of the judgment of the Circuit Court of Appeals for the Eighth Circuit is:

The court erred in holding that the telegraph messages transmitted for respondent by the telegraph company up to the amount of $75,000 did not, under the terms of the contract between the two companies, constitute services for hire, and that they are therefore not taxable under the provisions of Sections 500(f) and 501(a) of the Reve-

nue Act of 1918 and Sections 500(a) and 501 of the Revenue Act of 1921.

Argument

THE TELEGRAPH MESSAGES TRANSMITTED FOR RESPONDENT BY THE WESTERN UNION TELEGRAPH COMPANY UNDER A CONTRACT FOR THE MUTUAL EXCHANGE OF SERVICES OR FACILITIES ARE TAXABLE

The error in the instant case lies in the conclusion by the Circuit Court of Appeals that the messages transmitted for respondent up to the amount of $75,000 named in the contract between respondent and the telegraph company were free. That such is not the case is readily demonstrable.

The contract (R. 15–17) in substance provides that $75,000 worth of telegraph messages "charged" for at usual tariff rates should be furnished respondent by the telegraph company in return for $75,000 worth of railroad transportation "charged" for at the usual tariff rates and other services and facilities, and an adjustment made in actual cash at the end of the year for any excess charge for services rendered to either party. If both parties render services for which the total amount "charged" is within $75,000, then no cash payment enters into the transaction. If one party exceeds the maximum allowance such party must pay in cash for such excess. If both parties render services in excess of said allowance, the party against whom the lowest amount is charged pays the excess or difference to the other. Thus in effect

the contract amounts to an agreement to arrive yearly at an account stated within certain limits, payment to be in kind measured in terms of money. This is unmistakably shown by reference to the tabular statement of respondent's yearly settlements with the telegraph company. (R. 51.) It will be noted that this statement is computed in terms of dollars and cents and shows that for the year ended August 31, 1920, the charge against respondent for telegraph service was less than $75,000, while the charge against the telegraph company for transportation service was greater than that amount. For the other two years, 1921 and 1922, given in the statement both parties to the agreement exceeded the limit of $75,000.

Considering this tabular statement and the fourth paragraph of the contract together it is plain that the conclusion that there was no consideration for the telegraph services rendered to respondent—for that is what the decision of the Circuit Court of Appeals amounts to—is erroneous. More accurately, the services were charged for and measured in terms of money and, having been so charged and measured, were paid for by other services also measured in money's worth.

The distinction which the Circuit Court of Appeals draws between the " swapping of privilege " and the swapping of " service," which is the basis of its reversal of the District Court, does not affect the essentials of the case. Indeed, it is clearly a distinction without a difference, for even if we look

upon the facilities reciprocally exchanged as a "privilege," the fact still remains that the telegraph messages constituting the so-called "privilege" received by respondent were paid for by the railroad facilities constituting the "privilege" given by respondent in return therefor, and as we have just seen, such consideration is, both by the terms of the contract and in practice, measured and charged for on the basis of money. That is sufficient to bring the case within the provisions of Sections 500(f) and 501(a), which only require a "charge" plus a measurable payment based thereon by the person to whom the telegraph services were rendered. The use of the word "paid" in the provision of Section 501 that the taxes "shall be paid by the person paying for the services or facilities rendered" does not necessarily mean the employment of money to discharge the obligation. Anderson's Dictionary of Law thus defines the word *pay*, "To discharge an obligation by a performance according to its terms or requirements, whether the obligation be for money, merchandise, or services" (citing authority).

It is also to be noted that the court holds telegraph messages up to the amount of $75,000 were not transmitted for hire and therefore are not taxable, while messages transmitted in excess of that amount were for hire and are taxable. This would seem to be an inconsistent ruling. By reference to the tabular statement on page 51 of the record, previously referred to, it will be seen that both parties

in the years 1921 and 1922 exceeded the allowance of $75,000. Consequently, under the terms of the contract, money was only paid to adjust the difference between the total for each character of service—that is, telegraph and railroad—rendered. Should not therefore the services rendered to the amount of the difference between $75,000 and the lower excess be just as free as those below $75,000? Manifestly, there is no difference in principle or legal effect.

The Government contends that the correct principle for the solution of the question in the case at bar is to be found in *Western Union Telegraph Company* v. *Delaware, Lackawanna and Western Railroad Company*, 282 Fed. 925 (D. C., N. Y. S.), and *Delaware, Lackawanna and Western Railroad Company* v. *Bowers*, decided January 22, 1926 (D. C., N. Y. S.); unreported to date, but set forth in the appendix hereto. Both of these cases involved closely similar facts and presented the same question as the instant case. In the first case the court said (p. 931):

> The Revenue Act provides that the taxes shall apply to all services rendered for hire. Giving reasonable scope to the legislative intent, the act, in my judgment, must be construed to cover all messages transmitted for an economic consideration—money or money's worth. It is difficult under a sound taxing policy to find a basis for differentiation between exchanges and cash-paid services.

> Counsel for the railroad company urges that the provisions in the act expressly providing for a tax on transportation services in respect of goods owned by the carrier indicate that the exchange of services, not being expressly enumerated, was impliedly excluded from taxation. But in my judgment these provisions tend rather to emphasize the broad and inclusive legislative intent. True, there might be some difficulty in working out the valuation to be placed upon messages transmitted under exchange of service agreements; but the administration of the act is vested in the Commissioner of Internal Revenue, who is empowered to issue regulations necessary and proper to carry into effect the general provisions of the law. The regulation issued by the Commissioner seems to comport with the general tenor of the act, and the record and arguments advanced before me do not indicate that it is unreasonable as applied to the present controversy. * * *

In the second case the court said:

> It is clear that the franked messages are not transmitted by the Telegraph Company for the benefit of the railroad without compensation, but in each case are in exchange for some valuable consideration. They are not, to be sure, paid in cash. I have had no little difficulty in arriving at a valuation for the messages, but there is a charge in fact made, and the method adopted by the Departmental Regulation fixing the value of

> the service is not unreasonable. The amount ordinarily charged to the public seems a fair measure of the worth of the service.

This is also the position adopted by the District Court in the instant case, and it is clearly sound both in law and logic.

Conclusion

In view of the large number of cases involving the same question now pending throughout the United States and the need of a definite rule for the guidance of the courts and the Treasury Department in the determination thereof, it is respectfully submitted that the petition for certiorari should be granted in this case.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

SEWALL KEY,
Attorney.

JULY, 1926.

APPENDIX

United States District Court, Southern District of New York

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, plaintiff

against

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE for the Second District of New York, defendant

(January 22, 1926)

AUGUSTUS N. HAND, District Judge:

This is an action to recover $3,408.10 taxes, plus a penalty of $170.41, which have been assessed against the plaintiff for the transmission of 37,913 messages by the Western Union Telegraph Company for the plaintiff between January 1, 1921, and August 31, 1921, pursuant to the Revenue Act of 1921. The messages were transmitted by the Western Union Telegraph Company pursuant to contract between the said Telegraph Company and the plaintiff. The plaintiff paid the taxes and the penalty under protest.

The taxes were assessed under the Revenue Act of 1921, the pertinent sections of which are as follows:

(a) In the case of each telegraph, telephone, cable, or radio dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided,* That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

(b) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such;

* * * * *

Sec. 501. That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

Sec. 502 (a) That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such

payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected to the collector of the district in which the principal office or place of business is located.

Article 5 of Regulations No. 57 of the Revenue Act of 1918 is adopted from the Act of 1921 by reference in a later regulation.

Messages transmitted under contract.— Where, by contract, a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section, 500 (f), of the Act. The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The question as to whether such messages relate to the operation of the business of a common carrier and whether they are "on line" or "off line" are immaterial. Thus, a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business "free" and all such messages over its lines off the railroad lines "free" to an amount not exceeding $10,000 per year calculated at its regular rates, and all messages over that amount at half rates, in consideration of services to be performed by the railroad in

the transportation of men and materials of the telegraph company. All such messages, whether "on line" or "off line," and whether "free" or at half rates, are subject to the tax provided by this section 500 (f) of the Act. The tax must be computed, collected, and paid upon each such message.

The contract between the Western Union and the plaintiff herein provided among other things the following:

Fifth. All messages of the officers and agents of the Railroad Company, pertaining to its railroad business, shall be transmitted free of charge by railroad operators on the wires set apart for said business between all telegraph stations on the line of the railroads covered by this agreement, and between said stations and New York City.

The Telegraph Company also agrees to issue to such officers of the Railroad Company as may be designated by the President or General Superintendent thereof, annual franks authorizing the free transmission of messages signed by such officers and answers thereto, relating strictly to the railroad or corporate business of the Railroad Company's railroads covered by this agreement, originating at or destined to points on the Telegraph Company's lines in the United States beyond or off the line of said railroads, to an amount not exceeding in any one year Twelve Hundred and fifty dollars ($1,250.00) for each one million dollars ($1,000,000) of gross earnings of the Rail-

road Company (not including sale of coal, but including coal freight earnings), for such year, as, for example, if such gross earnings of the Railroad Company in one year equal $10,000,000, then such amount would not exceed $12,500.

The tolls on all of such messages to or from points beyond or off the line of said railroads shall be calculated at the regular commercial day rates of the Telegraph Company between the points at which such messages originate and the points to which they may be destined. And the Railroad Company agrees to pay to the Telegraph Company one-half of its aforesaid rates on all such messages in excess of said amount above mentioned. Settlements under this section are to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for, not including messages sent over the wires set apart for the exclusive use of the Railroad Company, applies only to the transmission of messages concerning the operation and business of the Railroad Company's railroads covered by this agreement, and shall not be extended to any messages for transmission by cable, nor to messages containing market quotations or prices of commodities, or messages ordering sleeping car, parlor car, or steamer berths, merchandise, or accommodations for customers of the Railroad Company, the tolls on which messages shall be paid by such customers. But messages sent over wires set apart for the use of the

> Railroad Company shall not be of such a character as to compete with the business of the Telegraph Company, nor for persons who should pay the Telegraph Company's tolls on their messages.

The total amount of messages transmitted for the Railroad Company under Article "Fifth" has varied from year to year, as shown by the exhibit in evidence. In only one year since the date of the contract, namely 1913, has the amount of such messages exceeded the maximum amount which the Railroad Company was entitled under the second paragraph of said Article "Fifth" to have transmitted free, that is, without the payment of any rates, tolls, or charges of the Telegraph Company therefor. And for such excess messages the Railroad Company paid the Telegraph Company half rates.

Article "Ninth" of the contract provides for the free transportation by the Railroad Company of the officers and employees, and of the materials and supplies of the Telegraph Company. It reads as follows:

> Ninth. The Railroad Company agrees to transport free of charge over its railroads covered by this agreement upon application of the President, Vice President, or Superintendent of the Telegraph Company, all persons in the employ of the Telegraph Company when traveling on the business of said Company; and also to transport and distribute free of charge along the line of its

railroads covered by this agreement, all poles, wire, and other material and supplies for the construction, maintenance, operation, repair, and reconstruction of the lines and wires covered by this agreement, and of such additional wires and lines of poles and wires as may be erected under the provisions of this agreement, and also all material and supplies for the establishment, maintenance, and operation of the offices of each of the parties hereto at places along or adjacent to or at the termini of said railroads.

And the Railroad Company further agrees to transport without charge over its railroads covered by this agreement, the poles, wire, and other material and supplies of the Telegraph Company to be used on its lines beyond or off the line of said railroads covered by this agreement, to an amount computed at the regular current through or local transportation rates of the Railroad Company, as the case may be, not exceeding Seven Thousand dollars ($7,000) per annum during each of the first five (5) years, and not exceeding Eight Thousand Seven Hundred and Fifty dollars ($8,750) per annum during each of the next fifteen (15) years, and not exceeding Ten Thousand Five Hundred dollars ($10,500) per annum during each of the next ten (10) years, of the term of this agreement, for the first one thousand (1,000) miles or less of railroad owned, leased, or controlled by the Railroad Company and occupied by a telegraph line erected thereon and operated under the pro-

visions of this agreement, and Five Dollars ($5.00) per annum additional for each additional mile of railroad constructed, owned, leased, or controlled by the Railroad Company and occupied as aforesaid; and the Telegraph Company agrees to pay to the Railroad Company one-half of its aforesaid rates on all such transportation of poles, wire and other material and supplies in excess of said amount. Settlements to be made yearly.

The amount of freight transported for the Telegraph Company under Article "Ninth" has varied from year to year. In only two years since the date of the contract has the amount of off-line freight so transported exceeded the maximum amount which the Telegraph Company was entitled under the second paragraph of said Article "Ninth" to have transported without the payment of any rates or charges of the Railroad Company therefor. In these years the Telegraph Company paid the Railroad Company for the excess freight so transported one-half of the Railroad Company's tariff charges therefor. The parties by their contract agreed to afford one another various other rights and facilities.

It is clear that the franked messages are not transmitted by the Telegaph Company for the benefit of the railroad without compensation, but in each case are in exchange for some valuable consideration. They are not to be sure paid in cash. I have had no little difficulty in arriving at a valuation for the messages but there is a charge in fact made and the method adopted by the Depart-

mental Regulation fixing the value of the service is not unreasonable. The amount ordinarily charged to the public seems a fair measure of the worth of the service.

The opinion of Judge Mack in regard to the precise facts of the case though in the suit of the *Western Union Telegraph Co.* against *Delaware, Lackawanna & Western Ry. Co.*, 282 Fed. 925, to recover back the taxes paid on the messages for the account of the Railroad Company is of great weight and ought to be followed unless some clear reason exists to the contrary.

Accordingly a verdict is directed for the defendant.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 507

ARNOLD J. HELLMICH, UNITED STATES COLLECTOR of Internal Revenue, Petitioner

v.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS OF THE COURTS BELOW

The opinion of the District Court (R. 27) is not reported. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 34) is reported in 12 F. (2d), at page 978.

JURISDICTION

The judgment to be reviewed was entered April 28, 1926. (R. 39.) Petition for a writ of certiorari was filed July 12, 1926, and granted October

18, 1926 (R. 40), pursuant to the provisions of the Act of February 13, 1925 (c. 229, 43 Stat. 936).

QUESTION PRESENTED

The question presented is whether telegraph services rendered to the Missouri Pacific Railroad Company by the Western Union Telegraph Company, in return for which the railroad company rendered transportation and other services to the telegraph company under the terms of a contract for the mutual exchange of services, are taxable under the provisions of subdivision (f) of Section 500 and subdivisions (a) and (c) of Section 501 of the Revenue Act of 1918 and subdivision (a) of Section 500 and Section 501 of the Revenue Act of 1921, which imposed a tax on the transmission of telegraph messages, to be paid by the person paying for the service, and based on the amount of the charge.

STATEMENT

This action was brought in the United States District Court for the Eastern District of Missouri by the Missouri Pacific Railroad Company to recover taxes, amounting to $14,792.95, paid on the transmission of telegraph messages for it by the Western Union Telegraph Company during the period from March, 1920, to January, 1923, inclusive. (R. 8, 9.)

These telegraph messages were transmitted under the terms of a contract, dated October 24, 1911, for the mutual exchange of services between the Western Union Telegraph Company on the one part and

the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company on the other part, to the rights and obligations of which companies respondent succeeded. (R. 12–13.) The pertinent paragraphs of said contract are as follows (R. 11–12):

> Fourth. The telegraph company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroads covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, to be authorized by franks permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company, to be issued to such officers and agents of the railway companies as may be designated by their presidents or general managers; and the railway companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the telegraph company may require for its employes, supplies, and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews, and equipment for distribution service, and outfit, boarding and tool cars for work on the lines along said railroads, whenever required by the telegraph company. The transportation of employes to be authorized by passes to be issued by the railway companies on request of the

superintendent or other authorized officer of the telegraph company.

Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of services rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty-five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during such year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that, in the event that each of the parties hereto is rendered bills for such services in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000 there shall be no payment by either party to the other therefor.

Fifth. * * * At stations of the railway companies or either of them where the

railway companies maintain either a telegraph or telephone operator, and where the number of send paid and collect messages, whether sent by telegraph or telephone, from any such station are less than three thousand (3,000) a year, the operators and other employes of the railway companies, acting as the agents of the telegraph company, shall receive and transmit over the telegraph or telephone wires or circuits of either party, as may be most convenient, and shall deliver exclusively for the telegraph company, party hereto, such commercial or public messages as may be offered, and shall charge the tariff rates of the telegraph company therefor, and shall render to the telegraph company monthly statements of such business and full accounts of all receipts therefrom, and shall pay all of such receipts to the telegraph company in such manner and at such times as it may direct. The railway companies or either of them shall not be held liable for receipts from commercial or public telegraph business not paid over to the telegraph company by said railroad employes.

Said operators and employes shall not, without the consent of the telegraph company, transmit over the wires of either party hereto any free messages except those on the railway companies' business, and concerning all business of the telegraph company, whether paid or free, and whether sent by telegraph or telephone, shall conform to all rules, regulations, and orders of the tele-

graph company applicable thereto; provided, however, that such employes shall not be required to deliver commercial or public messages when it will interfere with their railroad duties, but all reasonable attention shall be given by such employes to the prompt delivery of such messages; and the telegraph company, when in its opinion it is necessary, shall employ messengers, whose wages shall be divided between the parties hereto according to the division of the gross receipts at such offices.

The telegraph company agrees to pay to the railway companies, as soon as practicable after the close of each month, ten (10) per centum of the gross cash receipts (excluding tolls on the railway companies' messages) received by the operators of the railway companies, acting for the telegraph company as hereinbefore provided, from commercial or public messages at offices in their stations, except that tolls on ocean cable messages and tolls or charges of other companies shall not be included in the division of such gross receipts, but shall be retained in full by the telegraph company.

The account between respondent and the telegraph company for the years covering the period in suit shows that the accounting was in terms of dollars and cents; that for 1921 and 1922 both parties to the agreement exceeded the maximum of $75,000, and that for 1920 the services rendered to the telegraph company by respondent exceeded the maximum, while services rendered by the telegraph com-

pany for respondent were below the maximum. (R. 32.)

The Commissioner of Internal Revenue, under the provisions of the Revenue Acts set forth below, assessed taxes on telegraph messages transmitted under the terms of the above-quoted contract. In applying the provision of the law that transmission of messages on which the service charge was less than 14 cents should not be taxed; that where the charge was from 14 cents to 50 cents the tax should be 5 cents, and where the charge was over 50 cents the tax should be 10 cents, the Commissioner determined the charge on each message by the established rates applicable to ordinary customers which the parties themselves had adopted as the basis of their contract. Payment was made under protest (R. 15), and upon the failure of the Commissioner of Internal Revenue to act upon a claim for refund within six months after it was filed (R. 16) this action was brought in the United States District Court for the Eastern District of Missouri for the recovery of the taxes so paid.

The District Court gave judgment for the Government (R. 16), on the ground that although the railroad company did not pay in money for telegraph messages up to $75,000, yet it paid in kind by the services which it in turn rendered for the Telegraph Company. (R. 29.) Upon writ of error (R. 1) this judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit (R. 39),

on the ground that "the contract up to $75,000 was a swapping of privilege rather than of service, and the mutual service up to that limit was free." (R. 39.) It accordingly held that telegraph messages up to the amount of $75,000 are exempt and those in excess of that amount are subject to the tax.

STATUTES INVOLVED

The pertinent parts of the Revenue Acts of 1918 and 1921 read:

> Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1101, 1102):
>
> SEC. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—
>
> * * * * *
>
> (f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and
>
> (g) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service fur-

nished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such;

* * * * *

SEC. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * *

(c) The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. * * *

Revenue Act of 1921 (c. 136, 42 Stat. 227, 284):

SEC. 500. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1918—

(a) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the

transmission of such dispatch, message, or conversation; and

(b) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such.

* * * * *

SEC. 501. That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

Pursuant to the authority vested in him by the above revenue acts, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated Article 9 of Regulations No. 57 of the Treasury Department, which provides:

Messages transmitted under contract.— Where, by contract, a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500 (f)) of the act. The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers,

calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of a common carrier and whether they are "on line" or "off line" are immaterial. Thus, a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business "free" and all such messages over its lines off the railroad lines "free" to an amount not exceeding $10,000 per year calculated at its regular rates, and all messages over that amount at half rates, in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether "on line" or "off line," and whether "free" or at half rates, are subject to the tax provided by this section (500 (f)) of the act. The tax must be computed, collected, and paid upon each such message. * * *

SPECIFICATION OF ERROR TO BE URGED

The court below erred in reversing the District Court and holding that the telegraph messages transmitted for respondent by the telegraph company up to the amount of $75,000 did not, under the terms of the contract between the two companies, constitute services for hire and that they are therefore not taxable under the provisions of subdivision (f) of Section 500 and subdivisions (a) and (c)

of Section 501 of the Revenue Act of 1918 and subdivision (a) of Section 500 and Section 501 of the Revenue Act of 1921.

SUMMARY OF ARGUMENT

The error in the instant case lies in the conclusion by the Circuit Court of Appeals that the telegraph messages transmitted for the railroad company were, under the terms of the contract, free. While the compensation for the messages was not in money, it was in money's worth. This is shown not only by an examination of the terms of the contract itself, but from the nature of such contracts generally as recognized by enactments of Congress and by the opinion of this Court in *Postal Telegraph-Cable Company* v. *Tonopah Railroad Company*, 248 U. S. 471. The language of the revenue acts is sufficiently broad in scope to include telegraph messages so paid for. Respondent's efforts to interpret the revenue acts in the light of the interstate commerce acts must fail, for the reason that the two classes of laws are not *in pari materia*. It is urged that the correct principle for the decision of the question here involved is to be found in *Western Union Telegraph Company* v. *Delaware, Lackawanna & Western Railroad Company*, 282 Fed. 925 (D. C. N. Y. S.), and *Delaware, Lackawanna & Western Railroad Company* v. *Bowers*, decided January 22, 1926 (D. C. N. Y. S.), unreported to date, but set forth in the appendix hereto.

ARGUMENT

I

THE TELEGRAPH SERVICES RENDERED TO RESPONDENT BY THE WESTERN UNION TELEGRAPH COMPANY WERE NOT FREE, BUT WERE PAID FOR BY THE TRANSPORTATION AND OTHER FACILITIES WHICH RESPONDENT IN TURN RENDERED THE TELEGRAPH COMPANY

The decision of the Circuit Court of Appeals is premised on the assumption that the messages transmitted for respondent up to the amount of $75,000 named in the contract between respondent and the telegraph company were free. That this is erroneous it is believed can be shown.

The contract (R. 11, 12) in substance provides that $75,000 worth of telegraph messages charged for at usual tariff rates should be furnished respondent by the telegraph company in return for $75,000 worth of railroad transportation charged for at usual tariff rates and other services and facilities, and an adjustment made in actual cash at the end of the year for any excess charge for services rendered to either party. If both parties rendered services for which the total amount charged is within $75,000, then no cash payment enters into the transaction. If one party exceeds the maximum allowance, such party must pay in cash for such excess. If both parties render services in excess of said allowance, the party against whom the lower amount is charged pays the excess or difference to the other party.

Under such provisions the telegraph services rendered to respondent were not free. It would certainly surprise the ordinary business man to be told that if he were furnished telegraph services under a contract such as this they would be free; yet that is what the decision of the Circuit Court of Appeals amounts to. Such a view is apparently at variance with the terms of the contract itself.

The terms of a contract are presumed to be used in their ordinary sense and to have their usual meaning. *Fitzgerald* v. *First National Bank of Rapid City*, 114 Fed. 474. This presumption points to the conclusion that the telegraph services furnished the respondent were not free. More accurately, such services were charged for and measured in terms of money and, having been so charged and measured, were paid for by other services on the part of respondent, also measured in money's worth. Thus in effect the contract is the ordinary agreement to arrive early at an account stated within certain limits, payment to be, not in cash, but in kind, measured in terms of money.

This interpretation is confirmed by reference to the tabular statement of respondent's yearly settlement with the telegraph company. (R. 32.) It will be noted that this statement is computed in terms of dollars and cents and shows that for the year ended August 31, 1920, the charge against respondent for telegraph services was $71,815.17, while the charge against the telegraph company for transportation services was $81,165.28. For

the other two years, 1921 and 1922, given in the statement, each party's account against the other for services was in excess of the contract limit of $75,000.

Contracts of the kind here under consideration have been in use for a great many years and are not unknown to Congress and the courts. Section 6 of the Interstate Commerce Act of 1887 (c. 104, 24 Stat. 379, 380) provided that it should be unlawful for any carrier to charge or receive from any person "a greater or less compensation" for any transportation services than was charged or received from any other person for like services. The Hepburn Act of 1906 (c. 3591, 34 Stat. 584, 587) amended this provision so as to prohibit any carrier from charging or receiving "a greater or less or *different* compensation" for transportation services than the rate specified in the tariff in effect at the time. Accordingly, in *Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S. 467, it was held that a carrier could not lawfully accept for services rendered by it compensation different in *kind* from that mentioned in its published schedule of rates. This decision was followed in *Chicago, Indianapolis & Louisville Railway Company* v. *United States*, 219 U. S. 486.

By Section 7 of the Act of June 18, 1910 (c. 309, 36 Stat. 539, 544), the Interstate Commerce Act was extended to include within its provisions telephone,

telegraph, and cable companies on a like basis with common carriers, and it was provided (p. 546) that—

> * * * nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.

There is certainly no suggestion of gratuitous service here. On the contrary, there is explicit recognition of the compensatory character of the services exchanged. The very object of the proviso, as shown by the circumstances existing at the time of its passage, was to permit railroad and telegraph companies to pay each other in kind for services rendered. If there can be any doubt as to this—and we submit that there can not be—it is set at rest by the statements of this Court in *Postal Telegraph-Cable Company* v. *Tonopah Railroad Company*, 248 U. S. 471. There a contract similar to the one here involved was under consideration. The point decided was that such a contract might lawfully include an exchange of services even beyond the lines of either party. In discussing the nature and purpose of such contracts this Court said (p. 475):

> All the great benefits derived on one side are the consideration for all those conferred upon the other.

This should be sufficient to dispose of any argument that the telegraph messages transmitted for respondent in the instant case were free.

The distinction which the Circuit Court of Appeals draws between the swapping of "privilege" and the swapping of "service," which is the basis of its reversal of the District Court with respect to messages up to $75,000, does not affect the essentials of the case. Indeed, it is clearly a distinction without a difference, for even if we look upon the facilities reciprocally exchanged as a "privilege," the fact still remains that the telegraph messages constituting the so-called "privilege" received by respondent were paid for by the railroad facilities constituting the "privilege" given by respondent in return therefor, and, as we have seen, such consideration is, both by the terms of the contract and in practice, measured and paid for in money's worth.

It is to be noted that the Circuit Court of Appeals holds that the telegraph messages up to the amount of $75,000 were not transmitted for hire and are therefore not taxable, while the messages in excess of that amount were for hire and are taxable. This is plainly an inconsistent rule. By reference to the tabular statement on page 32 of the record, previously referred to, it will be seen that both parties in the years 1921 and 1922 exceeded the allowance of $75,000. Consequently, under the terms of the contract money was only paid to adjust the difference between the total for each kind of service—that is, telegraph and railroad—rendered. Should not therefore the services rendered in the amount of the difference between $75,000 and the amount of the lower excess be considered on the theory of the

Circuit Court of Appeals just as free as those below $75,000? Manifestly there is no difference in principle or effect, and yet the court holds that all messages in excess of $75,000 were paid for and are taxable.

II

SUBDIVISION (F) OF SECTION 500 AND SUBDIVISIONS (A) AND (C) OF SECTION 501 OF THE REVENUE ACT OF 1918 AND LIKE PROVISIONS OF THE REVENUE ACT OF 1921 APPLY TO THE TELEGRAPH SERVICES RENDERED TO RESPONDENT BY THE WESTERN UNION TELEGRAPH COMPANY

If the telegraph services furnished respondent under the terms of the contract here involved are paid for, such services are taxable under a reasonable construction of subdivision (f) of Section 500 and subdivisions (a) and (c) of Section 501 of the Revenue Act of 1918 and subdivision (a) of Section 500 and Section 501 of the Revenue Act of 1921.

It is well settled that the words of a statute are to be understood in their natural, ordinary, and familiar meaning. *United States* v. *Isham*, 17 Wall. 496. And it is particularly true that phrases used in statutes describing objects of taxation are to be construed according to the common acceptation of the terms employed, rather than by refined or strained distinctions. *DeGanay* v. *Lederer*, 250 U. S. 376.

With this elementary rule in mind, there should be no difficulty in understanding the meaning of the law with which we are dealing. The language

is clear and unambiguous. It is provided (Section 500 (f) of the Act of 1918 and Section 500 (a) of the Act of 1921) that a tax shall be imposed, among other things, upon telegraph messages "for the transmission of which the charge is" within certain fixed limits. A "charge" means simply "The price demanded for a thing or service" (Webster's New International Dictionary), and in *Freight Discrimination Cases* (*Hines & Battle* v. *The Wilmington & Weldon R. R. Co.*), 95 N. C. 434, 440, the same word is defined as compensation for services rendered. In the case at bar, as we have previously shown, there is a charge in the sense of compensation for the telegraph company. It is true that this compensation is not in actual money, but it is in service measured in money. That is sufficient to bring the case within the provisions of the revenue acts here under consideration, which only require such a charge plus a reasonable payment based thereon by the person to whom the telegraph services were rendered. Nor does the use of the word "paying" in the further provision (Section 501 (a) of the Revenue Act of 1918 and Section 501 of the Revenue Act of 1921) that the taxes "shall be paid by the person paying for the services or facilities rendered" necessarily mean the employment of money to discharge the obligation.

There is another reason why the telegraph services here involved should be held to be taxable.

Congress was entirely familiar with contracts for the mutual exchange of services between railroads and telegraph companies of the kind here under consideration, for that body had, as shown in the preceding argument, specifically exempted such contracts from the provisions of the interstate commerce laws, yet Congress failed to include the telegraph services rendered under these contracts in the exemption from taxation extended to other classes of telegraph services in subdivision (g) of Section 500 of the Revenue Act of 1918 or subdivision (b) of Section 500 of the Revenue Act of 1921, which are identical in language, and read as follows:

> A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such.

From the failure to include the telegraph services involved in this case in the above exemption extended to other classes of telegraph services, under the rule *expressio unius est exclusio alterius* it is reasonable to assume that Congress intended such services to be taxed.

In deciding the case against the Government the Circuit Court of Appeals noticed the fact that under the terms of the contract it would be possible for respondent to pay for the telegraph services by exchanging transportation services of less than equal value. That is true, but it is not the case here, for the reason that the tabular statement on page 32 of the record shows that every telegraph message sent was fully paid for at the regular tariff rates by an exchange of transportation services of equal value. Thus, in 1920, $75,000 worth of railroad services was set off against $71,815 worth of telegraph services, and for the other two years, 1921 and 1922, equal amounts of each class of services were set off against one another up to the $75,000 limit. A case may be imagined where $75,000 worth of telegraph services would be received by respondent in exchange for but $25,000 worth of transportation services. Under such circumstances, of course, the question might arise in determining the charge for the service, which forms the basis for ascertaining the amount of the tax, whether the tax should be based on the assumption that the full commercial rate was charged for telegraph messages as provided in Article 9 of Regulations 57, *supra*, or whether the tax should be calculated on the assumption that the amount charged for each message was less than the established rate, in the proportion that the total amount in service and money paid for the telegraph service

fell below the total charge on the basis of the established rate.

A similar difficulty exists where, figured at the established rates, the amount of the transportation service exceeds the amount of telegraph service, because in that event the amount paid for each telegraph message would be more than the established rate, and in determining whether the charge for any telegraph message was more or less than 14 cents or 50 cents, and the tax nothing, five cents or ten cents, the method of proportion above mentioned would result in treating the charge for each message as more than the established tariff.

The difficulties in calculating the tax, in hypothetical or actual cases, under a contract like this, do furnish some argument against the position of the United States, but the solution presented by Article 9, Regulations 57, seems to be sound, in requiring the use of the established rates as the basis for determining the cost of each message, and since that basis is the one which the parties themselves have used in their contract, the regulation seems reasonable.

The Government contends that the correct principle for the solution of the question in the case at bar is to be found in *Western Union Telegraph Company* v. *Delaware, Lackawanna & Western Railroad Company*, 282 Fed. 925 (D. C. N. Y. S.), and *Delaware, Lackawanna & Western Railroad Company* v. *Bowers*, decided January 22, 1926 (D. C. N. Y. S.); unreported to date, but set forth in the

appendix hereto. Both of these cases involved closely similar facts and presented the same question as the instant case. In the first case the court said (p. 931):

> The Revenue Act provides that the taxes shall apply to all services rendered for hire. Giving reasonable scope to the legislative intent, the act, in my judgment, must be construed to cover all messages transmitted for an economic consideration—money or money's worth. It is difficult under a sound taxing policy to find a basis for differentiation between exchanges and cash-paid services.
>
> Counsel for the railroad company urges that the provisions in the act expressly providing for a tax on transportation services in respect of goods owned by the carrier indicate that the exchange of services, not being expressly enumerated, was impliedly excluded from taxation. But in my judgment these provisions tend rather to emphasize the broad and inclusive legislative intent. True, there might be some difficulty in working out the valuation to be placed upon messages transmitted under exchange of service agreements; but the administration of the act is vested in the Commissioner of Internal Revenue, who is empowered to issue regulations necessary and proper to carry into effect the general provisions of the law. The regulation issued by the Commissioner seems to comport with the general tenor of the act, and the record and arguments advanced before

me do not indicate that it is unreasonable as applied to the present controversy.

In the second case the court said:

> It is clear that the franked messages are not transmitted by the Telegraph Company for the benefit of the railroad without compensation, but in each case are in exchange for some valuable consideration. They are not to be sure paid in cash. I have had no little difficulty in arriving at a valuation for the messages but there is a charge in fact made and the method adopted by the Departmental Regulation fixing the value of the service is not unreasonable. The amount ordinarily charged to the public seems a fair measure of the worth of the service.

The same position was adopted by the District Court in the instant case, which said (R. 29):

> Clearly, plaintiff got this service, and for this service the usual charge was made by the telegraph company; or, to put it another way, an account was kept of the service, based upon the usual charge therefor, which the public would have had to pay. Plaintiff did not pay cash or in money for this service, at least up to the sum of a total of seventy-five thousand dollars, but it paid in kind; that is, it rendered freight and passenger transportation service to the telegraph company in exchange for telegraphic service rendered by the latter, until the plaintiff had thus swapped or bartered with the telegraph company seventy-five thousand dollars' worth of service. Above this amount of

> credit or of service to be paid for in service the transactions on the part of both companies with each other were in effect in no wise different from similar sales of service by either company to the general public.

It is submitted that these decisions are sound both in law and logic.

III

THE INTERSTATE COMMERCE ACT AND THE REVENUE ACTS OF 1918 AND 1921 ARE NOT IN PARI MATERIA

It will doubtless be urged upon this Court by respondent, as it was in the courts below, that the provisions of the Interstate Commerce Act permitting contracts between telegraph companies and carriers for the mutual exchange of services and the provisions of the Revenue Acts of 1918 and 1921 under consideration are *in pari materia* and that therefore decisions of the courts interpreting certain provisions of the Interstate Commerce Act should control in the instant case. This contention is based upon the use of the word " charge " in the Interstate Commerce Act and the interpretations thereof in various decided cases. The argument, which rests upon a false premise, was rejected by the Circuit Court of Appeals and should also be rejected by this Court.

The mere fact that a certain word was used in one sense in a statute regulating the conduct of the business of common carriers and the rates to be charged for services and facilities rendered can not

justify a reference to such regulatory statute to determine the meaning of the same word used in a revenue statute imposing a tax on one employing the services or facilities of a carrier. The decision in *United States* v. *Colorado & Northwestern Railroad Company*, 157 Fed. 321, completely disposes of all the contentions of respondent along this line. In that case it was held that the rule *in pari materia* did not apply to the Interstate Commerce Act and the Safety Appliance Acts. See also *Maxwell* v. *Moore*, 22 How. 185.

Nor is the reference made in this brief (Argument I) to the interstate commerce laws inconsistent with this position. Such reference was solely for the purpose of showing the historical background of the contract. In no sense was it for the purpose of determining the meaning of the one statute in the light of the meaning given the words of the other—which is what respondent attempts to do.

It only remains to dispose of the suggestion of the Circuit Court of Appeals that the Government in collecting the tax here involved relied upon mere bookkeeping entries. This suggestion is premised on the assumption that the telegraph services furnished respondent were free. We have already shown (Argument I) that this assumption is false. It is true that reference has been made to the accounting practices of respondent in this brief, but only for the purpose of showing the practical interpretation given by the parties themselves to the

contract. This is a rule of construction often adopted by the courts. *Bunday v. Huntington*, 224 Fed. 847.

CONCLUSION

In brief, the Government's contention is that the telegraph messages transmitted for the respondent by the Western Union Telegraph Company for which charges were made measured in terms of money, and which charges the respondent paid for by railroad transportation, also charged for and measured in terms of money, are within the purview of the sections of the revenue acts here under consideration.

Accordingly, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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DECEMBER, 1926.

APPENDIX

United States District Court, Southern District of New York

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, plaintiff

against

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE for the Second District of New York, defendant

(January 22, 1926)

AUGUSTUS N. HAND, District Judge:

This is an action to recover $3,408.10 taxes, plus a penalty of $170.41, which have been assessed against the plaintiff for the transmission of 37,913 messages by the Western Union Telegraph Company for the plaintiff between January 1, 1921, and August 31, 1921, pursuant to the Revenue Act of 1921. The messages were transmitted by the Western Union Telegraph Company pursuant to contract between the said Telegraph Company and the plaintiff. The plaintiff paid the taxes and the penalty under protest.

The taxes were assessed under the Revenue Act of 1921, the pertinent sections of which are as follows:

> (a) In the case of each telegraph, telephone, cable, or radio dispatch, message, or

conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided,* That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

(b) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such;

* * * * *

SEC. 501. That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

SEC. 502 (a) That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected to the collector of the district in which the principal office or place of business is located.

Article 5 of Regulations No. 57 of the Revenue Act of 1918 is adopted from the Act of 1921 by reference in a later regulation.

> *Messages transmitted under contract.*—Where, by contract, a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section, 500 (f), of the Act. The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The question as to whether such messages relate to the operation of the business of a common carrier and whether they are "on line" or "off line" are immaterial. Thus, a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business "free" and all such messages over its lines off the railroad lines "free" to an amount not exceeding $10,000 per year calculated at its regular rates, and all messages over that amount at half rates, in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether "on line" or "off line," and whether "free" or at half rates, are subject to the tax provided by this section 500 (f) of the Act. The tax must be computed, collected, and paid upon each such message.

The contract between the Western Union and the plaintiff herein provided among other things the following:

> Fifth. All messages of the officers and agents of the Railroad Company, pertaining to its railroad business, shall be transmitted

free of charge by railroad operators on the wires set apart for said business between all telegraph stations on the line of the railroads covered by this agreement, and between said stations and New York City.

The Telegraph Company also agrees to issue to such officers of the Railroad Company as may be designated by the President or General Superintendent thereof, annual franks authorizing the free transmission of messages signed by such officers and answers thereto, relating strictly to the railroad or corporate business of the Railroad Company's railroads covered by this agreement, originating at or destined to points on the Telegraph Company's lines in the United States beyond or off the line of said railroads, to an amount not exceeding in any one year Twelve Hundred and fifty dollars ($1,250.00) for each one million dollars ($1,000,000) of gross earnings of the Railroad Company (not including sale of coal, but including coal freight earnings), for such year, as, for example, if such gross earnings of the Railroad Company in one year equal $10,000,000, then such amount would not exceed $12,500.

The tolls on all of such messages to or from points beyond or off the line of said railroads shall be calculated at the regular commercial day rates of the Telegraph Company between the points at which such messages originate and the points to which they may be destined. And the Railroad Company agrees to pay to the Telegraph Company one-half of its aforesaid rates on all such messages in excess of said amount above mentioned. Settlements under this section are to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for, not

> including messages sent over the wires set apart for the exclusive use of the Railroad Company, applies only to the transmission of messages concerning the operation and business of the Railroad Company's railroads covered by this agreement, and shall not be extended to any messages for transmission by cable, nor to messages containing market quotations or prices of commodities, or messages ordering sleeping car, parlor car, or steamer berths, merchandise, or accommodations for customers of the Railroad Company, the tolls on which messages shall be paid by such customers. But messages sent over wires set apart for the use of the Railroad Company shall not be of such a character as to compete with the business of the Telegraph Company, nor for persons who should pay the Telegraph Company's tolls on their messages.

The total amount of messages transmitted for the Railroad Company under Article "Fifth" has varied from year to year, as shown by the exhibit in evidence. In only one year since the date of the contract, namely 1913, has the amount of such messages exceeded the maximum amount which the Railroad Company was entitled under the second paragraph of said Article "Fifth" to have transmitted free, that is, without the payment of any rates, tolls, or charges of the Telegraph Company therefor. And for such excess messages the Railroad Company paid the Telegraph Company half rates.

Article "Ninth" of the contract provides for the free transportation by the Railroad Company of the officers and employees, and of the materials and supplies of the Telegraph Company. It reads as follows:

Ninth. The Railroad Company agrees to transport free of charge over its railroads covered by this agreement upon application of the President, Vice President, or Superintendent of the Telegraph Company, all persons in the employ of the Telegraph Company when traveling on the business of said Company; and also to transport and distribute free of charge along the line of its railroads covered by this agreement, all poles, wire, and other material and supplies for the construction, maintenance, operation, repair, and reconstruction of the lines and wires covered by this agreement, and of such additional wires and lines of poles and wires as may be erected under the provisions of this agreement, and also all material and supplies for the establishment, maintenance, and operation of the offices of each of the parties hereto at places along or adjacent to or at the termini of said railroads.

And the Railroad Company further agrees to transport without charge over its railroads covered by this agreement, the poles, wire, and other material and supplies of the Telegraph Company to be used on its lines beyond or off the line of said railroads covered by this agreement, to an amount computed at the regular current through or local transportation rates of the Railroad Company, as the case may be, not exceeding Seven Thousand dollars ($7,000) per annum during each of the first five (5) years, and not exceeding Eight Thousand Seven Hundred and Fifty dollars ($8,750) per annum during each of the next fifteen (15) years, and not exceeding Ten Thousand Five Hundred dollars ($10,500) per annum during each of the next ten (10) years, of the term of this agreement, for the first one thousand (1,000) miles or less of railroad owned, leased, or controlled

by the Railroad Company and occupied by a telegraph line erected thereon and operated under the provisions of this agreement, and Five Dollars ($5.00) per annum additional for each additional mile of railroad constructed, owned, leased, or controlled by the Railroad Company and occupied as aforesaid; and the Telegraph Company agrees to pay to the Railroad Company one-half of its aforesaid rates on all such transportation of poles, wire, and other material and supplies in excess of said amount. Settlements to be made yearly.

The amount of freight transported for the Telegraph Company under Article "Ninth" has varied from year to year. In only two years since the date of the contract has the amount of off-line freight so transported exceeded the maximum amount which the Telegraph Company was entitled under the second paragraph of said Article "Ninth" to have transported without the payment of any rates or charges of the Railroad Company therefor. In these years the Telegraph Company paid the Railroad Company for the excess freight so transported one-half of the Railroad Company's tariff charges therefor. The parties by their contract agreed to afford one another various other rights and facilities.

It is clear that the franked messages are not transmitted by the Telegraph Company for the benefit of the railroad without compensation, but in each case are in exchange for some valuable consideration. They are not to be sure paid in cash. I have had no little difficulty in arriving at a valuation for the messages but there is a charge in fact made and the method adopted by the Depart-

mental Regulation fixing the value of the service is not unreasonable. The amount ordinarily charged to the public seems a fair measure of the worth of the service.

The opinion of Judge Mack in regard to the precise facts of the case though in the suit of the *Western Union Telegraph Co.* against *Delaware, Lackawanna & Western Ry. Co.*, 282 Fed. 925, to recover back the taxes paid on the messages for the account of the Railroad Company is of great weight and ought to be followed unless some clear reason exists to the contrary.

Accordingly a verdict is directed for the defendant.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ARNOLD J. HELLMICH, United States Collector of Internal Revenue, Petitioner, vs. MISSOURI PACIFIC RAILROAD COMPANY, Respondent.	No. 507.

SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

STATEMENT.

The Solicitor General, on behalf of Arnold J. Hellmich, United States Collector of Internal Revenue, has filed a petition praying that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the case of **Missouri Pacific Railroad Company v. Arnold J. Hellmich**, No. 7129, rendered April 28, 1926 (Rec., p. 56).

The judgment entered by the Court of Appeals reversed a finding and judgment for Hellmich, as Collector, entered by the United States District Court for the Eastern Division of Missouri and directed that judgment should be entered for the Railroad Company on account of its claim for taxes exacted by the Commissioner of Internal Revenue on telegraphic messages transmitted under a contract between the Western Union Telegraph Company and the Railroad Company. The contract was entered in the year 1911, long prior to the enactment of the Revenue Act of 1918.

Under the contract between the Western Union Telegraph Company and the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, in consideration of certain services to be rendered by the Railway Companies to the Western Union and other considerations mentioned in the contract, the Telegraph Company agreed to transmit over its lines, without payment or other charge than that afforded by the service rendered to the Telegraph Company by the Railway Companies and the other considerations set forth in the contract, telegrams annually up to a limit of $75,000.00. The provisions of the contract pertinent are the following:

> "Fourth. The Telegraph Company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroads covered by this agreement, as the Railway Companies may desire, for messages pertaining to their railroad business, to be authorized by franks

permitting all classes of messages and telegraphic letters in public use on the lines of the Telegraph Company, to be issued to such officers and agents of the Railway Companies as may be designated by their presidents or general managers; and the Railway Companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the Telegraph Company may require for its employes, supplies and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews and equipment for distribution service, and outfit boarding and tool cars for work on the lines along said railroads, whenever required by the Telegraph Company. The transportation of employes to be authorized by passes to be issued by the Railway Companies on request of the superintendent or other authorized officer of the Telegraph Company.

"Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of service rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during such year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000

in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that in the event that each of the parties hereto is rendered bills for such services in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000, there shall be no payment by either party to the other therefor."

It is the contention of the Railroad Company that telegraphic messages transmitted under the provisions of the contract were not taxable under the provisions of Sections 500 (f), 501 (a) of the Revenue Act of 1918, and Sections 500 (a) and 501 of the Revenue Act of 1921.

The District Court rendered judgment for the Collector and, upon writ of error to the Circuit Court of Appeals, the judgment was reversed, that court holding that only telegraphic messages in excess of the contract allowance of $75,000 were subject to tax.

The Missouri Pacific Railroad Company had succeeded to all of the contract rights and privileges of the companies named in the contract and was rendering the services in performing the contract on its part, as the successor of the former companies.

It is the contention of the attorneys for petitioner that, because the decision of the Circuit Court of Appeals is in conflict with two decisions of two district courts of the United States, certiorari should be granted.

BRIEF.

I.

A conflict of decisions between district courts and a circuit court of appeals does not authorize the issuance of a writ of certiorari by this court.

United States Supreme Court Rule 35, Paragraph 5;
Sec. 240 (a) United States at Large, Vol. 43, p. 938;
Forsyth v. Hammond, 166 U. S., l. c. 514;
American Construction Co. v. Jacksonville R. R. Co., 148 U. S. 372.

II.

The amount of telegrams sent each year, up to $75,000, is exempt from taxation, because there was no charge for such service within the meaning of Sections 500, 501 (a), 502, Revenue Act, 1918; Sections 500, 501, 502 (a), Revenue Act, 1921.

III.

There is no "charge" for services when the creditor has no right to demand payment in money.

L. & N. Ry. Co. v. Motley, 219 U. S. 467;
C. I. & L. Ry. Co. v. U. S., 219 U. S. 486;
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IV.

An exchange of service between a telegraph company and a railroad company may be arranged upon the basis of reciprocal advantage, without regard to the rates charged for similar service to the public.

Postal Telegraph Co. v. Railroad Co., 248 U. S. 471.

V.

It is an accepted rule of interpretation as to taxing statutes, that they should be construed in favor of the taxpayer and against the Government.

Gould v. Gould, 245 U. S. 153;
Benziger v. U. S., 192 U. S. 38.

ARGUMENT.

It is respectfully submitted by the Missouri Pacific Railroad Company, respondent herein, that the reasons urged in the petition for the issuance of a writ of certiorari do not justify the issuance of such writ by this Court. It is stated in the petition that, under circumstances somewhat similar to the facts disclosed by the record in this case, the United States District Court of New York, in the case of **Western Union v. Lackawanna Railroad Co., 282 Fed. 925**, and Judge Hand of the District Court of the Southern District of New York, in the case of **Delaware, Lackawanna & Western Railroad Co. v. Bowers, Collector of Internal Revenue for the Second District of New York** (decided January 22, 1926), have rendered decisions not in harmony with the decision of the United States Circuit Court of Appeals for the Eighth Circuit in this cause. It does not appear that any review was sought in the District Court decisions referred to.

The issuance of a writ of certiorari is not a matter of absolute right and this Court in Rule 35 of the Revised Rules adopted June 8, 1925, says:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

"(b) **Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter;** or has decided an important question of local law in a way probably in conflict with applicable local decisions.

"Or has decided an important question in a way probably untenable or in conflict with the weight of authorities.

"Or has decided an important question of federal law which has not been, but should be, settled by this Court," etc.

There is present, therefore, no conflict between the decision of the United States Circuit Court of Appeals and any other Court of Appeals, and it is only by the exercise of discretion that the writ can issue.

In

Forsyth v. Hammond, 166 U. S., l. c. 514,

this Court said:

"We reaffirm in this case the propositions heretofore announced, to wit, that the power of this Court in certiorari extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the

circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between **two or more courts of appeal, or between courts of appeal** and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

II.

The portions of Sec. 500 of the Revenue Act of 1918 particularly applicable to telegraph companies are subdivisions (f), (g) and (h), which fix the rate of tax to be paid on telegrams.

Subdivision (a) of section 501 provides

> "that the taxes imposed by section 500 shall be paid by the **person** paying for the services or facilities rendered."

Subdivision (c) of section 501 provides:

> "The taxes imposed by section 500 shall apply to all services or facilities specified in such section, **when rendered for hire**, whether or not the agency rendering them is a common carrier."

Section 502 of the act provides:

> "That each person **receiving any payments** referred to in section 500 shall collect the amount of the tax, if any, imposed by such section, from the person **making** such payments and shall make monthly returns under oath, in duplicate, and pay the taxes so collected, and

> the taxes imposed upon it under subdivision (c) or (d) of section 501, to the Collector of the District in which the principal office or place of business is located."

When Congress passed the Revenue Act, providing for a tax upon messages to be paid by the person paying for the services, and excepted services rendered

> "upon transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier," etc.,

and

> "any commodity which is necessary for the use of the carrier in the conduct of its business, as such,"

it had before it the Interstate Commerce Act which had been passed in 1908 and amended in the year 1917, making telegraph companies common carriers to all intents and purposes by the use of the following language:

> "The term 'common carrier,' as used in this act, shall include * * * telegraph, telephone and cable companies operating by wire or wireless."
>
> Subparagraph 3, Section I, Interstate Com. Act.

And Congress also had before it the exception contained in subparagraph 5, Section I of the Interstate Commerce Act, as follows:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from

entering into contracts with common carriers **for the exchange of services.**"

The Circuit Court of Appeals, in its decision in this case, cited the recent decision of the United States Supreme Court in the case of

George Iselin v. United States (decided March 1, 1926),

to the effect that departmental construction cannot be given the force and effect of law, and then said:

> "The real question is, did these messages upon which the tax was based come within the intendment of subdivision (f) of Section 500 of the Act of 1918? If we adhere strictly to the technical meaning of the language used, we might answer in the affirmative, but this law, as all others, must be construed in the light of the true intent, object and purpose of the legislation. It was not intended thereby to tax any service of this kind which was not rendered for hire; that is to say, for a return either in money or property. In other words, the term 'charge' as used in the act is not a mere bookkeeping term. It means a return in tangible value, measured in money, according to the nature, length and destination of the message. It is so used in regulation 49. When we say 'we make no charge' we mean 'we exact no payment.'
>
> "This contract contemplated no payment at all for mutual services up to $75,000. The payments contemplated were upon the excess, or balance of excess, above $75,000. The charge on the books, in terms of

dollars and cents, as applied to individual messages (and, of course, corresponding charges were made on the books of the railroad company for transportation furnished) was simply to keep a record for the purpose of ascertaining whether any chargeable excess should come into existence against either party to the contract. This appears from the annual settlements made. For the year ending August 31, 1920, the net transportation charges of the railroad against the telegraph company were $80,721.72. The total telegraphic charges for services furnished by the Western Union Company were $71,815.17. The excess of transportation charges over the free carriage allowed up to $75,000 was $5,721.72, but the excess of railroad service over telegraph service was $8,906.55. If the whole volume of service was subject to payment, settlement being made on general balances, the railroad should have demanded and received $8,906.55, but, instead, in accordance with the terms of the contract, it received but $5,721.72. In other words, on each side service up to $75,000 was free, to be used or not used as desired. There was no purpose to charge for it. The fact that where mutual services were actually rendered in excess of $75,000 an appearance of payment, dollar for dollar, is presented, furnishes no controlling guide to ascertainment of the nature of the transaction. The consideration in this contract was not the reciprocal services themselves, on an established tariff basis, but the privilege or option to receive $75,000 worth of free service, should either or both so elect. If each party was, in effect, to charge at the tariff rates for all services without franking privileges, no contract would have been necessary."

The situation is somewhat similar to that reviewed by this Court in the case of

Postal Telegraph Co. v. Tonopah R. R. Co., 248 U. S., l. c. 475,

where the Court said:

> "The railroad and the telegraph have grown together in mutual dependence and we are told that contracts of this sort for long terms have been nearly universal for fifty years. The contracts had been called to the attention of Congress repeatedly by the Commission, which, in December, 1906, stated that, so far as it could see, the full performance of them by the carriers would not affect any public or private interest adversely.
>
> "It held, however, that under the law as it then stood contracts for services off the line were unlawful (12 I. C. C. 10, 12). Then the amendment of 1910 was passed, and passed, we must suppose, having the opinion of the Commission and the notorious long-standing form of existing contracts in view. The contracts are complex, as we have said, and entire. We cannot believe that an act which purported to allow them meant to break them up. The Commission seems not to have believed it in its first ruling upon the amended act."

III.

We respectfully submit that the decision of the Court of Appeals for the Eighth Circuit correctly interpreted the provisions of the contract which was the subject of review, and, if the decision of that court is correct, there is

no occasion for reviewing it here because a district court, or courts, may have heretofore held otherwise. The decision of the Court of Appeals is in harmony with the general rule of interpretation as to taxing statutes announced by this Court in the case of

Gould v. Gould, 245 U. S. 153,

where the Court said:

> "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the Government and in favor of the citizen."

For the reasons stated, the petition for certiorari should be denied.

MERRITT U. HAYDEN,
EDW. J. WHITE and
JAMES F. GREEN,
Attorneys for Missouri Pacific Railroad Company.

FILED

JAN 11 1926

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

ARNOLD J. HELLMICH, United States Collector of Internal Revenue, Petitioner,

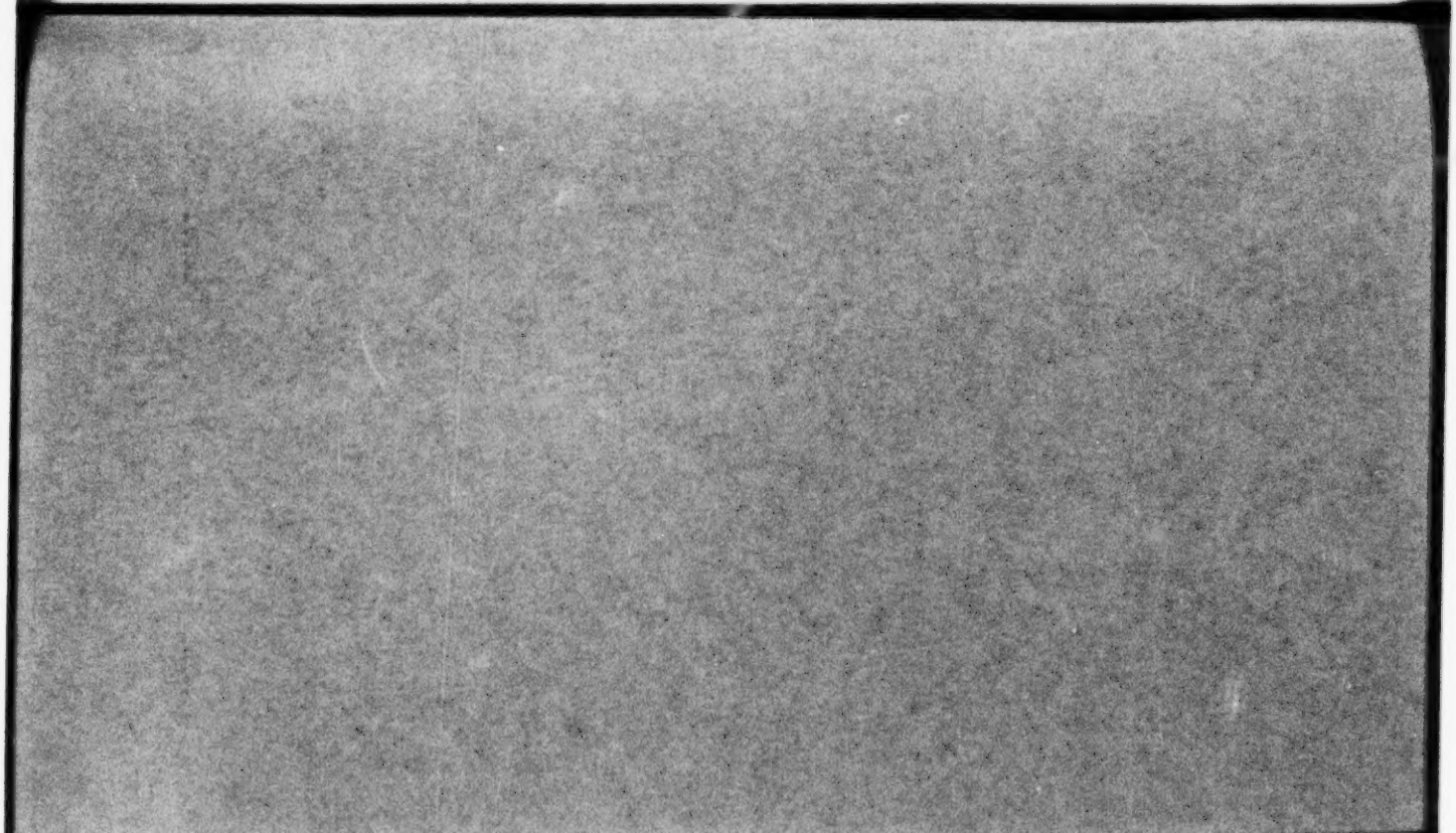
vs.

MISSOURI PACIFIC RAILROAD COMPANY.

No. 567.

STATEMENT, BRIEF AND ARGUMENT FOR MISSOURI PACIFIC RAILROAD COMPANY.

JAMES F. GREEN and EDW. J. WINNE, Counsel for Missouri Pacific Railroad Company.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ARNOLD J. HELLMICH, United States Collector of Internal Revenue, Petitioner, vs. MISSOURI PACIFIC RAILROAD COMPANY.	No. 507.

STATEMENT, BRIEF AND ARGUMENT FOR MISSOURI PACIFIC RAILROAD COMPANY.

STATEMENT.

The Government obtained a writ of certiorari to review the action of the United States Circuit Court of Appeals for the Eighth Judicial Circuit reversing the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, in the suit of Missouri Pacific Railroad Company to recover income taxes paid amounting to

$14,792.95 on Western Union telegraph messages during the period of March, 1920, to January 23, 1923, inclusive.

All said messages were attempted to be taxed by the Government under Article IX of Regulation 57 of the Commissioner of Internal Revenue, and the taxes were paid under protest and then action instituted to recover same.

There was no dispute upon the facts that all of said messages were transmitted under the standard form of the Western Union contract, under the terms of which the Railroad Company and the Telegraph Company exchanged services as common carriers up to the maximum amount specified in said standard form of contract.

There was also no dispute upon the fact that under the Interstate Commerce Act of 1908, as amended in the year 1917, telegraph companies were made common carriers to all intents and purposes by the use of the following language:

> "The term 'common carrier,' as used in this act, shall include * * * telegraph, telephone and cable companies operating wire or wireless."
>
> Subparagraph 3, Section 1, Interstate Commerce Act.

Nor was there any dispute upon the proposition that by subparagraph 5, Section 1 of the Interstate Commerce Act it was clearly provided:

"That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services,"

and the following portion of subparagraph 7, Section 1 of the Interstate Commerce Act:

"Provided that this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employes of common carriers and their families; * * * and provided, further, that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof with each other for the officers, agents, employes and their families of such telegraph, telephone and cable lines, and the officers, agents, employes and their families of other common carriers subject to the provisions of this act."

In view of these provisions of the Act to Regulate Commerce authorizing the exchange of services, and the fact that Paragraph G of Section 500 of the Revenue Act of 1918, subparagraph 2, excepted the tax to be paid upon messages transmitted "in the conduct by a common carrier or telegraph or telephone company of its business as such," and that by Paragraph (c) of Section 501 of the said Revenue Act of 1918, expressly providing that:

"Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transporta-

> tion of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used, or has been used; or (2) upon the transportation of company material transported by one carrier, which constituted a part of a railroad system, for another carrier which is also a part of the same system."

the Court of Appeals held that such services were not taxable.

It was contended in the District Court that the attempt of the Commissioner of Internal Revenue by Regulation No. 57 to tax Western Union frank messages sent under the said contract,

> "whether such messages relate to the operation of the business of the common carrier and whether they are on line or off line * * * and whether free or at half rates, or subject to the tax provided by this section,"

was, in effect, a void and unwarranted order, inconsistent with the clear intent of Congress.

And in view of regulation No. 49 of the Commissioner of Internal Revenue, under Section 501 of the Revenue Act of 1918, providing as follows, that when

> "the railroad company, under contract, transports commodities necessary to maintain or operate such telegraph or telephone line or lines * * * and the railroad company makes no charge for such transportation the charges which, but for such arrange-

ment, would have accrued on such transportation **are exempt from the tax,"**

that the Government had admitted that the Act to Regulate Commerce and the Revenue Act were in pari materia, and, having exempted the services rendered by the railroad company, authorized under the Act to Regulate Commerce to be exchanged for the services rendered by the telegraph company, that the service rendered by the telegraph company, the other party to the contract, **was likewise exempt from taxation.** The opinion of the United States Circuit Court of Appeals for the Eighth Judicial Circuit in this case was as follows:

"Before Stone, Van Valkenburgh and Booth, Circuit Judges. Van Valkenburgh, Circuit Judge, delivered the opinion of the Court.

"The Revenue Act of 1918, among other things, provided:

"'Sec. 500. That from and after April 1, 1919, there shall be levied, assessed, collected and paid in lieu of the taxes imposed by Section 500 of the Revenue Act of 1917:

* * * * * * *

"'(f) In the case of each telegraph, telephone, cable or radio dispatch, message or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and, if the charge is more than 50 cents, a tax of 10 cents; **PROVIDED**, that

only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message or conversation.

"'Sec. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * * * *

"'(c) The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. * * * Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

* * * * * * *

"'The returns required under this section shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.'

"The Commissioner of Internal Revenue prescribed the following regulations deemed pertinent to this inquiry. Article IX of Regulations, numbered 57:

"'Messages Transmitted Under Contract.—Where by contract a telegraph, telephone, radio or cable company agrees, in consideration of the payment of a

lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500-f of the act). The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of the common carrier and whether they are "on-line" or "off-line" are immaterial. Thus a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business "free" and all such messages over its lines off the railroad line "free" to an amount not exceeding ten thousand dollars ($10,000.00) per year calculated at regular rates, and all messages over that amount at half rates in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether "on-line" or "off-line" and whether "free" or at half-rates, are subject to the tax provided by this section (500-f) of the act. The tax must be computed, collected and paid upon each such message.'

"Regulation No. 49, issued by the Internal Revenue Department in 1920:

"'If a telegraph or telephone line or lines along the line of any railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company, under contract, transports commodities necessary to maintain or operate such telegraph

or telephone line or lines along the line of such railroad company, such commodities being intended to be, or having been so used, and the railroad company makes no charge for such trassportation, the charges which, but for such arrangement, would have accrued upon such transportation, are exempt from the tax.'

"On the 24th day of October, 1911, the Western Union Telegraph Company and the predecessors of plaintiff in error, all common carriers engaged in interstate commerce, and subject to the Act of Congress to Regulate Interstate Commerce, entered into a written contract, the material parts of which are as follows:

" 'The Telegraph Company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroad covered by this agreement, as the Railway Companies may desire, for messages pertaining to their railroad business, to be authorized by frank permitting all classes of messages and telegraphic letters in public use on the lines of the Telegraph Company, to be issued to such officers and agents of the Railway Companies as may be designated by their presidents or general managers; and the Railway Companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the Telegraph Company may require for its employes, supplies and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews and equipment for distribution service, and outfit, boarding and tool cars for work on

the lines along said railroads, whenever required by the Telegraph Company. The transportation of employes to be authorized by passes to be issued by the Railway Companies on request of the superintendent or other authorized officer of the Telegraph Company.

"'Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of service rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during the year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, *provided*, that, in the event that each of the parties hereto is rendered bills for such service in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000, there shall be no payment by either party to the other therefor.'

"This contract was in full force and effect between plaintiff in error and the telegraph company at the

time of the enactment of the Revenue Act of 1918, to which reference has been made.

"The Interstate Commerce Act, which forbids any common carrier subject to its provisions, directly or indirectly, by any special rate, rebate, drawback or other device, to charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered than it charges, demands, collects or receives from any other person or persons, for a like service, provides further that 'nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services' (Sec. 8569, Compiled Statutes of the United States 1916).

"The arrangement made by the contract of October 24, 1911, although an apparent departure from the provisions of the original act against granting special rates or charges, was thus recognized by Congress and approved by the Supreme Court for the reason that the interdependence of such companies is very intimate. The railroads and the telegraph companies have grown together in mutual dependence; each is necessary to the other. The bargain between them is a very complex one, and all the benefits derived on one side, including those of a pecuniary nature, form the consideration for all the benefits conferred upon the other.

Postal Telegraph Cable Co. v. Tonopah R. R., 248 U. S. 471.

"Defendant in error made demand upon plaintiff in error in May and June, 1923, for taxes claimed to be

due on account of franked Western Union messages transmitted during the period from March, 1920, to January, 1923, inclusive, aggregating $14,792.95. These taxes covered all messages sent, including the free service provided by the contract. Plaintiff in error paid these sums under protest, the sufficiency of which is conceded, and, thereafter, in March, 1924, brought suit for the recovery thereof. It is agreed that plaintiff in error duly appealed to the Commissioner of Internal Revenue for refund, and that the Commissioner failed to render any decision or make any response to such appeal for more than six months after the same was presented to him. It is further agreed that if the Court should find for the railroad company, judgment should be rendered in its favor for the sums claimed, to wit, $14,792.95. Upon submission to the Court, on stipulation of parties waiving a trial by jury, a judgment was rendered in favor of defendant in error.

"Plaintiff in error urges that the Revenue Act of 1918 and the Interstate Commerce Act, above quoted, are in pari materia, and that the latter should be considered as governing the application of the former. To this we cannot agree, because the two acts do not deal with the same subject matter. The parties are the same, but the subject matter in the one case is taxation; in the other, the regulation and control of carriers. The latter act differentiates carriers from ordinary shippers permitting contracts for exchange service. The language of this Court in **United States v. Railroad, 157 Fed. 321**, is conclusive upon this question. Nevertheless, the Commerce Act is instructive and pertinent as revealing the attitude of the Government toward contracts of this nature.

"We also agree with the trial court that Regulation No. 57 has no force as creating a tax. The regulation is powerless to enlarge the act. We may also concede the general rule that long interpretation of a statute by an executive department charged with its enforcement is entitled to weight, and that under some circumstances a subsequent enactment without change has been held to indicate approval of prior administrative construction and interpretation; but this rule would apply equally to Regulation No. 49, whereby the telegraph company is, by interpretation, exempted from tax where the railroad company, under contract, transports commodities necessary to maintain or operate such telegraph lines along the line of the railroad company, on the ground that the railroad company makes no charge for such transportation. In this respect, in our opinion, the interpretations disclosed by these two regulations are inconsistent. In this view, it is improbable that Congress had this feature in mind at all when it passed the later Act of 1921, for certainly it cannot be said that the railroad did not charge for the transportation in the same sense as the telegraph company did for the messages. The situation presented is similar to that before the Supreme Court in **George Iselin v. United States**, decided March 1, 1926, 271 U. S. 136, in which it was held that such departmental construction cannot be given the force and effect of law.

"The real question is, did these messages upon which the tax was based come within the intendment of subdivision (f) of Section 500 of the Act of 1918? If we adhere strictly to the technical meaning of the language used, we might answer in the affirmative; but

this law, as all others, must be construed in the light of the true intent, object and purpose of the legislation. It was not intended thereby to tax any service of this kind which was not rendered for hire; that is to say, for a return either in money or property. In other words, the term charge as used in the act is not a mere bookkeeping term. It means a return in tangible value, measured in money, according to the nature, length and destination of the message. It is so used in Regulation 49. When we say, 'We make no charge,' we mean, 'We exact no payment.'

"This contract contemplated no payment at all for mutual services up to $75,000. The payments contemplated were upon the excess or balance of excess, above $75,000. The charge on the books, in terms of dollars and cents, as applied to individual messages (and, of course, corresponding charges were made on the books of the Railroad Company for transportation furnished), was simply to keep a record for the purpose of ascertaining whether any chargeable excess should come into existence against either party to the contract. This appears from the annual settlements made. For the year ending August 31, 1920, the net transportation charges of the Railroad against the Telegraph Company were $80,721.72. The total telegraphic charges for services furnished by the Western Union Company were $71,815.17. The excess of transportation charges over the free carriage allowed up to $75,000 was $5,721.72; but the excess of railroad service over telegraph service was $8,906.55. If the whole volume of service was subject to payment, settlement being made on general balances, the Railroad should have demanded and received $8,906.55, but, in

stead, in accordance with the terms of the contract, it received but $5,721.72. In other words, on each side, service up to $75,000 was free to be used or not as desired. There was no purpose to charge for it. The fact that where mutual services were actually rendered in excess of $75,000 an appearance of payment, dollar for dollar, is presented, furnishes no controlling guide to ascertainment of the nature of the transaction. The consideration in this contract was not the reciprocal services, themselves, on an established tariff basis, but the privilege or option to receive $75,000 worth of free service, should either or both so elect. If each party was, in effect, to charge at the tariff rates for all services without franking privileges, no contract would have been necessary.

"This contract was made in 1911 before either the war or this war tax was thought of. It is in no sense self-serving nor designed to defeat the revenue. As said in **Postal Telegraph-Cable Company v. Tonopah R. R. Company**, supra, contracts of this nature have been nearly universal for fifty years. The apprehension that they can be employed at will to accomplish immunity from taxation is groundless. When the act was passed, Congress could have expressly provided against such a result if it had been deemed necessary or if such abuse should creep in, it can at any time be met by appropriate legislation. The trial court was admittedly in doubt on the question. It was finally controlled by the view that the contract involved a swapping of services, which, therefore, were for hire; but the contract up to $75,000 was a swapping of privilege rather than of service, and the mutual service up to that limit was free. This is dem-

onstrated by the contemplated operation. If the Railroad had handled no shipments for the Telegraph Company, but had sent messages not exceeding $75,000 in value, it would have paid nothing, although the latter would have rendered $75,000 worth of service and would have charged that amount on its books. The Government seeks to convert a mere bookkeeping fiction into an item of income; but this is not permissible. The transaction must be viewed in its substantial and not in its purely technical aspect. Messages up to the amount of $75,000 did not constitute services for hire, and are, therefore, exempt; those in excess of that amount are subject to tax. The case is **reversed and remanded with directions to apply this rule. It is so ordered.**

Filed April 28, 1926."

BRIEF.

I.

The amount of telegrams sent each year under the terms of the contract up to $75,000.00 was exempt from taxation, because there was no "charge" for such service within the meaning of the act, it being necessary to the accrual of a tax that there should be a "charge."

(a) The word "charge" in the Revenue Act means the price demanded for the service.

Webster's International Dictionary, defining the word "charge";
Century Dictionary and Cyclopedia, defining the word "charge";
Oxford Dictionary, defining the word "charge";
Detroit etc. v. Interstate Commerce Commission, 74 Fed. 803;
Williams v. Western Union Telegraph Co., 203 Fed. 140.

(b) There is no "charge" for services when the creditor has no right to demand payment in money.

L. & N. Rwy. Co. v. Mottley, 219 U. S. 467;
T. & P. Rwy. Co. v. Mugg, 202 U. S. 242;
C. I. & L. Rwy. Co. v. United States, 219 U. S. 486.

(c) Subdivision (f) of section 500 does not impose a tax where there is no right of the Telegraph Company to demand payment for the telegrams sent.

II.

All the telegrams sent by the Western Union Telegraph Company for the Missouri Pacific Railroad Company upon which the tax was attempted to be collected were exempt from the tax.

Sections 500, 501 (a) and 502 of the Revenue Act of 1918;

Sections 500, 501 and 502 (a) of the Revenue Act of 1921.

III.

Article 46 (c) of Regulations 49, promulgated by the Commissioner of Internal Revenue, admits that on a proper and fair construction of the statute there is no "charge" on any of the service rendered by the Telegraph Company to the Railroad Company up to the amount of $75,000.00, provided for in the contract.

IV.

As to the tariffs, rates and charges established under the Interstate Commerce Act do not apply under an agreement for an exchange of service between common carriers,

the "charge" which is attempted to be taxed under section 500 does not exist (Sec. 4563 [3] Compiled Statutes U. S. 1916).

V.

The other numerous subdivisions of Section 500 of the Revenue Act of 1918 imposing a tax upon the amount "paid" are associated with subdivision (f) thereof imposing a tax upon the amount of the "charge," and this association of subdivisions required that that meaning of the word "charge" be accepted which is closest to the meaning of the word "paid."

Gould v. Gould, 245 U. S. 153;
United States v. Field, 255 U. S. 257;
Smietenka v. First Trust & Savings Bank, 257 U. S. 602;
United States v. Salen, 235 U. S. 237;
United States v. Weitzel, 246 U. S. 533.

VI.

This Court having held under the Act to Regulate Commerce that the Interstate Commerce Commission could not prevent the exchange of services between telegraph and railroad companies, whether on or off the line of the railroad company, the Commissioner of Internal Revenue could not prevent such free exchange of service, nor provide that the Railroad Company should pay the Western

Union therefor, or should pay the Government a tax as though such service was subject to a legal charge or payment.

VII.

In attempting to tax services which the Railroad Company was authorized to exchange with the Telegraph Company and to assess such tax upon "all such messages whether 'on line or off line' and whether 'free or deadhead rates,' " the Commissioner of Internal Revenue was, in effect, repealing the provisions of the Act to Regulate Commerce authorizing such free exchange of services and the decision of this Court that such free exchange of services whether on or off the line of the Railroad Company, were proper.

Postal Telegraph & Cable Co. v. Tonapah & Tidewater R. R. Co., 248 U. S. 471.

ARGUMENT.

I.

The contract governing the full exchange of services by these common carriers provides:

> **"There shall be no payment by either party to the other party therefor,"**

referring to the exchange of service, up to seventy-five thousand dollars ($75,000.00).

This contract, therefore, on its face provided that there should be no "payment" for the telegraph service exchanged for the transportation rendered by the railroad company, and in the face of the fact that Section 501 of the Revenue Act of 1918 provides that the taxes claimed by the Government

> "shall be paid by the person **paying for the service**,"

and that section 500 provides for a

> "tax equivalent to ten per centum (10%) of the amount **paid** after such date to any telegraph or telephone company * * * shall not apply to the amount **paid** * * * in the conduct by a common carrier or telephone or telegraph company of its business as such."

and that these revenue acts thus clearly evidence an intention that taxes shall be paid on Western Union messages only where the message has been **"paid"** for

> "by the person **paying** for the service,"

and that even where the messages are paid for that no tax is to be collected for service rendered

> "in the conduct, by a common carrier or telephone or telegraph company, of its business as such,"

the Commissioner of Internal Revenue undertook by Regulation No. 57 to include all classes of messages mentioned in the contract of the plaintiff with the Western Union Telegraph Company, which provided that

> "there shall be no payment by either party to the other therefor,"

and thus to tax messages of common carriers which are clearly excepted in the statute, although no payment had been made therefor, by holding that these messages were paid for. Both the contract and the undisputed evidence shows they were not paid for, but were authorized by the Interstate Commerce Act and by the Revenue Act to be exempted from the tax attempted to be imposed by this regulation.

The Collector in his brief quotes numerous definitions of the word "charge" to show that the services of the

Western Union Company were charged to the Railroad Company, but the word with which the Revenue Act concerns itself is the word "paid."

The contract under which the services were rendered in this case provides that no payment shall be made for services within the seventy-five-thousand-dollar ($75,000) limit, and the statute only imposes a tax for services for which payment was made.

Of course, the word "charge," as used in the books in the illustrations mentioned in the brief of the collector, as where the freight charges of a carrier imply the obligation to settle for the charge, is in accordance with the common-law rule which creates a corresponding obligation to pay for services which can be recovered for under a quantum meruit, but this is wholly beside the question rendered upon payments made for services where no payment at all was made and where the law excepted the class of service rendered to the party against whom the tax is imposed from the payment of the tax. The argument that the exchange of services "was a payment in kind" overlooks the spirit and intent of the Interstate Commerce Act, which includes

"the transmission of intelligence by wire"

as necessary services of a common carrier; telegraph companies are defined as included within the term "common carrier" and the Government expressly authorizes, in the

Interstate Commerce Act, the exchange of services between telegraph companies and railroad companies (subsections (1), (3), (5) and (7), Section I, Interstate Commerce Act of June 29, 1906, as amended May 29, 1917, and August 10, 1917), the Interstate Commerce Act containing the following provision:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services" (Subsection 5, Section I, Interstate Commerce Act).

This Court, in Postal Telegraph Co. v. Tonopah R. Co. (248 United States, p. 472), upholds this provision of the act, and the Revenue Act was passed after this decision and after the enactment of the Interstate Commerce Act, which authorized the exchange of services and legalized the contract of the plaintiff and the Western Union Telegraph Company in this case, in which no payment was made for the services rendered up to the seventy-five-thousand-dollar ($75,000.00) limit. The argument of the collector that it is not necessary for the consideration to be a monetary one, of course, has no application to a taxing statute where a tax is only imposed where the consideration paid was a monetary one. The Government, by the Interstate Commerce Act, authorizes the exchange of services without payment; the Revenue Act excepts services rendered by common carriers under this act from the

tax. The regulation of the Commissioner attempts to impose the tax on this service thus excepted and hence the regulation of the Commissioner of Internal Revenue cannot have the force and effect of law, because contrary to the taxing statute.

In view of this fact, the argument of the Collector that Regulation No. 57 was reasonably adapted to the enforcement of Subdivision (f) Section 500 of the Revenue Act, "and, therefore, has the force and effect of law," cannot be true, since it imposes a tax where none was imposed by the statute, and unless the courts are to hold that the power to impose the tax resides in the Commissioner of Internal Revenue and not in the representatives of the people, his Regulation No. 57 cannot have "the force and effect of law."

The case of Western Union Telegraph Co. v. Delaware and Lackawanna Company (282 Fed. 925) can have no application here, because there the parties attempted to make a case to uphold the regulation of the Commissioner of Internal Revenue and not to have the question fairly determined by the Court. The Collector was not a party to the suit, and hence was not bound by the Court's decision, and the remarks of the Court as to the validity of the regulation of the Commissioner of Internal Revenue, in the absence of evidence, was purely obiter. Evidence was adduced in this case of the unreasonableness of the regulation and of the custom and manner of handling the services sought to be taxed; hence the Collector, under

the agreed statement, was not entitled to the tax and the railroad's right of recovery, under the agreed statement and the provisions of the Revenue Act and the attempted Regulation No. 57, should be apparent.

II.

The Amount of the Telegrams Sent Each Year Up to $75,000 Is Exempt From Taxation, Because There Was No "Charge" for Such Service Within the Meaning of the Act, It Being Necessary to the Accrual of the Tax That There Be a "Charge."

(a) **Statutes on the same subject must be read in connection with the Revenue Acts.** The taxes imposed by Section 500 of the Revenue Act of 1918 were assessed upon the same subjects which are controlled and regulated by the Interstate Commerce Act. Section 8563, paragraph 1, Compiled Statutes United States 1916 (Interstate Commerce Act), provides as follows:

> "The provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from

one state, territory or district of the United States to any other state, territory or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment) from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry, either in the United States or any adjacent foreign country. Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid."

Section 500 of the Revenue Act of 1918 and the Interstate Commerce Act are in pari materia and under well-established principles of law, words common to both acts are to be construed and given like meaning. The rule is stated in 36 Cyc, page 1147, as follows:

> "Statutes in pari materia are those which relate to the same person or thing or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it as together constituting one law. * * * **Whenever a Legislature has used a word in a statute in one sense and with one meaning and subsequently uses the same word in legislating on the same subject matter, it would be understood as using it in the same sense unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby.**"

Section 500 (f) imposes "in the case of each telegram, telephone, cable or radio dispatch, message or conversation * * * for the transmission of which the **charge** is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the **charge** is more than 50 cents, a tax of 10 cents."

Section 8563, paragraph 3, Compiled Statutes of the United States 1916 (Interstate Commerce Act), reads as follows:

"All charges made for any service rendered, or to be rendered, in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. Provided, that messages by telegraph, telephone or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages; and provided, further, that nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

Section 8564, Compiled Statutes of the United States 1916 (Interstate Commerce Act), reads as follows:

"If any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substan-

tially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 8569, Compiled Statutes of the United States 1916 (Interstate Commerce Act), reads, in part, as follows:

"(1) Every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line or by water, when a through route and joint rate have been established. * * *

"(3) No change shall be made in the rates, fares and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days notice to the Commission and to the public, published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. * * *

"(7) No carrier, unless otherwise provided by this

act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportotion of passengers or property, except such as are specified in such tariffs: Provided, that wherever the word 'carrier' occurs in this act it shall be held to mean 'common carrier.'" * * *

(b) **The word "charge" in the Revenue Act means the price demanded for the service.** The word "charge" is defined by the dictionaries as follows:

"Webster's International Dictionary.—'n. 10. The price demanded for a thing or service. 11. An entry or account of that which is due from one party to another; that which is debited in a business transaction; as, a **charge** in an account book.'

"Century Dictionary and Cyclopedia.—'n. 8. That which constitutes debt in commercial transactions; the sum payable as the price of anything bought or

any service rendered; an entry; the debit side of an account.'

"Funk & Wagnall's New Standard Dictionary.—'n. 3. The price fixed or demanded for anything, as for a service rendered or merchandise sold; as, the **charge** is reasonable. 4. An entry in bookkeeping, setting down an item or sum to some account; as, a charge of $10 dated October 1.'

"Oxford Dictionary.—'17. To subject or make liable (a person, estate, etc.) to a pecuniary obligation or liability. 18. To charge (a sum or price) (a) To impose as a liability on pecuniary charge; (b) to impose, claim, demand or state as the price or sum due **for** anything; (d) with double object (combining 17 and 18): To charge a person a certain sum (for a service or thing sold). 11. A liability to pay money laid upon a person or estate.'

"Words and Phrases (vol. 1, 2d ser. 636.—'To "charge" is to lay on or impose as a load, tax or burden; to fix or demand a price for a thing or service. The word as used in an alternative writ of mandamus, setting up that a railroad charges and has charged rates in excess of the rates prescribed by the Railroad Commissioners, cannot be said to be indefinite and indeterminate in meaning (State ex rel. Atty.-Gen. v. Atlantic Coast Line Ry. Co., 37 South. 652, 656, 48 Fla. 114).'"

While the word "charge" has two meanings, to wit, (a) an entry in an account book, or (b) the price demanded for anything, it is quite apparent that the word is used in the latter sense in both the Interstate Com-

merce Act and Section 500 of the Revenue Act of 1918, and that just as the Interstate Commerce Act means by the word "charge" the price demanded, so the "charge" upon which this tax accrues is the price demanded.

This tax does not accrue unless a price is demanded for the transmission of the telegram. The measure of the tax is the price demanded for the transmission of the telegram—that alone is the "charge." If no price is demanded, there is no charge, and the mere fact that a memorandum is entered in a book of accounts with an amount of dollars opposite such memorandum would not constitute a charge, if this memorandum is controlled by a legal contract that no price is to be demanded.

In Detroit, etc., v. Interstate Commerce Commission, 74 Fed. 803, the word "charges" is defined as the dues demanded in connection with the transportation, etc., described by the act.

In Freight Discrimination Cases, 59 American Rep. 250, the Court defined the term "charge" as follows:

> "The clause, 'to charge for the transportation of any freight,' etc., implies to settle, require or demand of the shipper, as of right, certain compensation for the transportation of any freight already transported, or delivered to the corporation to be transported. As to this, the penalty is incurred when the charge is certainly made against the shipper, in the case provided against by the statute. It cannot be that the compensation charged must first be paid, because it is unlawful 'to charge' otherwise

than is allowed. This does not, in any ordinary sense, imply to receive the compensation, and there is nothing that in terms or by just implication goes to show that any such meaning was intended. The purpose is to give the penalty at once upon making the charge and thus the more certainly to prevent the evil intended to be suppressed, and a violation of the statute."

See, also:

Lehigh Valley Rwy. Co. v. Rainey, 112 Fed. 487; Williams v. Western Union Telegraph Co., 203 Fed. 140.

We take it as plain that the only meaning of a book entry as a charge is to evidence the price which is to be demanded for the service, and that if the book entry does not evidence the price to be demanded for services it does not evidence that there is any charge, the real charge upon which the tax is imposed being the price demanded for the service.

(c) **There is no "charge" for services rendered under an option for an option.** In the present case, no price was to be demanded for telegrams amounting to $75,000. By virtue of the privilege given to the Telegraph Company and the Railroad Company in the statute above quoted, the Railroad Company offered to the Telegraph Company transportation equal at its regular charges to $75,000, and agreed to make no charge for such service, and the Telegraph Company offered to the Railroad Com-

pany telegraphic services equal at its regular charges to $75,000, and agreed to make no charge for such service. The entries in the books were mere memoranda to record when either party reached this maximum of free service.

The service rendered by the Railroad Company was not payment to the Telegraph Company for the service which it rendered. It was not the consideration given by the Railroad Company to the Telegraph Company for the transmission of telegrams. If a mutual consideration be found, it is in the agreement of the parties each to the other to render service up to a certain amount and not in the actual rendition of services. If the Railroad Company had not transported a penny's worth of freight for the Telegraph Company the latter could not have demanded payment for telegrams sent up to $75,000. The Railroad Company therefore did not pay $75,000 of transportation for the transmission of telegrams and was not required to pay that amount. It gave only the option to the Telegraph Company to take that much service.

This condition is best evidenced by the settlement between the parties in the year ending August 31, 1920. In that year the Telegraph Company sent telegrams for the Railroad Company to the total of $71,815.75, in accordance with the manner of reckoning under the contract. On the other hand, the Railroad Company carried freight for the Telegraph Company amounting to $80,721.72, and the Telegraph Company paid the Railroad Company the sum of $5,721.72. If the freight carried by the Railroad Com-

pany was the consideration for the telegrams sent by the Telegraph Company, then the Railroad Company was charged for telegrams aggregating $71,815.75, a total of $75,000. Quite apparently this is an absurdity, and yet it is the necessary conclusion of the Government's argument.

We believe that the contract itself refutes the Government's argument on this end of the controversy. If the Telegraph Company had sent $75,000 worth of telegrams for the Railroad Company and the Railroad Company had not carried a penny's worth of freight for the Telegraph Company, the Railroad Company would not have owed the Telegraph Company anything. The Telegraph Company would have had a memorandum in its accounts showing that it had carried telegrams up to $75,000, but the contract discloses that no price was to be demanded for this service, and, therefore, these memoranda did not constitute charges or evidence of charges. It is clear that in this situation the Railroad Company was not charged $75,000 for sending these telegrams. The mere fact that transportation was furnished under the privilege granted to the Telegraph Company does not make that transportation the consideration for the Telegraph Company's telegrams when it is considered that the telegrams could have been sent even though no freight had been carried. Plainly, the only thing or price demanded from the Railroad Company for the sending of these telegrams was the option granted to the Telegraph Company to call on the Railroad

Company for the transportation of its freight, and that option does not constitute a charge of $75,000 or any other amount.

The only purpose of stating an amount in the memoranda kept by both companies was to keep a record of the terms of the contract and the maximum of free service of each party. If the contract had provided that the Railroad Company might have 100,000 telegrams and the Telegraph Company might have 100,000 freight ton miles of transportation then, if we understand the Government's argument, it would be conceded that there was no charge for the telegrams, because neither the transportation nor the telegrams would be reduced to dollars. The memoranda would have stated only the number of telegrams sent and the freight ton miles of freight carried. We cannot see that it makes an iota of difference whether the memoranda of the transactions under the contract is kept in terms of dollars or in any other terms. The existence of the "charge" is a fact dependent upon statutory rights, that is, the right to demand the price.

(d) **There is no "charge" for the services when the creditor has no right to demand payment in money.** The charge which telegraph companies, as well as railroad companies, with the exception stated in Section 8563, Compiled Statutes U. S., above quoted, are compelled to make and demand under the Interstate Commerce Act is required to be made in dollars and to be settled in cash. They are not permitted to make a charge of freight or

service or anything else. Their charges must be made and collected in money and not otherwise.

In L. & N. Rwy. Co. v. Mottley, 219 U. S. 467, it was held that a carrier engaged in interstate commerce cannot lawfully charge or collect or receive anything but money for transportation on its road since the Act of June 29, 1906, prohibited any carrier from demanding, collecting or receiving "a greater or less or different compensation" for the transportation of persons or property or for any service in connection therewith than that specified in its published schedule of rates and fares and charges.

To like effect see:

C. I. & L. Ry. Co. v. U. S., 219 U. S. 486;
U. S. v. C. I. & L. Rwy. Co., 163 Fed. 114;
I. C. v. Holman, 64 So. 7;
Cowley v. Northern Pacific Rwy. Co., 123 Pac. 998.

In the above-mentioned causes it is held that agreements to accept advertising for freight, to give a pass in settlement of damages for personal injuries and to give passes to persons conveying land are all illegal.

In Section 8569 (7), Compiled Statutes U. S. 1916, it is provided:

> "Nor shall any carrier charge, demand or collect or receive a greater or less or different compensation for such transportation or passengers or property or for any service in connection therewith between the

points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

As has just been pointed out, the courts in numerous decisions have construed the word "charge," as used in the Interstate Commerce Act, to require a **payment of money**. When Congress subsequently enacted the Revenue Act of 1918 and used the word "charge" therein, it adopted as a part of said act the construction placed upon that word by the courts in construing the Interstate Commerce Act.

36 Cyc 1153 thus succinctly states the rule:

> "Where a statute that has been construed by the courts has been re-enacted in the same, or substantially the same, terms, the Legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction. **So where words or phrases employed in a new statute have been construed by the courts to have been used in a particular sense in a previous statute on the same subject, or one analogous to it, they are presumed, in the absence of a clearly expressed intent to the contrary, to be used in the same sense in the new statute as in the previous statute.**"

As Section 500 of the Revenue Act of 1918 and the Interstate Commerce Act relate to the same subjects, there can be no question that the rule applies in this case, and

that the word "charge" is used in subdivision (f) of section 500 in the same sense as it is used in the Interstate Commerce Act.

Section 500 (f) of the Revenue Act of 1918 provides that "in the case of each telegraph * * * message * * * for the transmission of which **the charge** is more than 14 cents and not more than 50 cents, a tax of 5 cents, and if **the charge** is more than 50 cents a tax of 10 cents." The word "the" is the definite article. The statute does not say if more than 14 cents and less than 50 cents is charged or a charge of more than 14 cents and less than 50 cents is made. Neither does it say "a charge." It says "the charge." Carriers who contract to receive less than the published rates must nevertheless collect the published rates (Texas & Pacific Rwy. Co. v. Mugg, 202 U. S. 242). Whether the Telegraph Company contracted to receive less or more than the regular rate the tax is imposed upon the regular rate because "the charge" means the charge imposed, regulated and controlled under the Interstate Commerce Act. "The charge" taxed is the charge payable only in money fixed and established under the Interstate Commerce Act. When Congress used the words "the charge" in the Revenue Acts it merely transplanted them from the Interstate Commerce Act, in which they had acquired a defined and definite meaning.

Moreover, as is pointed out above, there is no "charge" for service received under mutual options for services, and certainly there is no charge up to the amount which

the Telegraph Company has the option to receive in railway service and which it may or may not receive as it sees fit. The service which the Telegraph Company rendered becomes free of charge, because when the service was rendered it had already received the option which paid for the service. The consideration between the parties was an option for an option; it was not service for service.

(c) **Subdivision (f) of section 500 does not impose a tax where there is no right of the Telegraph Company to demand payment for the telegrams sent.** The Government concedes that the service rendered by the Railroad Company for the Telegraph Company was not paid for, and therefore it does not impose any tax against the Telegraph Company upon the freight service rendered by the Railroad Company. It justifies the tax against the Telegraph Company only because the tax upon telegrams is imposed upon the amount "charged," whereas the tax upon freight is imposed upon the amount "paid."

The use of these words does not justify any such distinction. The word "charge" appearing in the subdivision relating to telegrams was used in place of the word "paid" appearing in the other subdivision of section 500 only because of different character of the subjects taxed.

Freight, express service and similar items are very generally sent charges collect from consignee. If the consignee refuses the freight and the consignor is not solvent the carrier's only remedy is to resort to the freight car

ried, which may or may not pay the charges. Carriers frequently of necessity rely upon the freight carried to collect their charges. On the other hand, no credit is ever extended by a telegraph company or a telephone company to a telegraph message itself, or to a telephone conversation, and nothing could be collected out of these subjects. The thing carried is of no value for the purpose of collecting charges. If credit is extended, it is always extended to the sender of the message, and failure of the telegraph or telephone company to collect its charge results merely from its indiscretion in extending credit. The tax, therefore, upon telegraph and telephone messages accrues whether or not the credit extended is paid, while the tax against transportation by railroads, which, in the natural course of their business, frequently cannot collect in advance, and which by the laws are given a lien upon the freight or express carried for the collection of these charges, is imposed only upon the amount paid. This is the reason for the substitution of the word "charge" as to telegraph and telephone messages for the word "paid" which appears in the other subdivisions of section 500.

The only distinction between the incidence of the tax upon freight and the incidence of the tax upon telegrams is that one is imposed upon the amount "paid" and the other one is imposed upon the "amount charged." But neither tax arises except upon payment, as is evidenced by section 501 (a), which provides "that the taxes imposed by section 500 shall be paid by the person paying

for the service or facilities rendered," and by section 502, which provides "that each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section." The use of the word "charge" in the tax on telegrams in lieu of the word "paid" in the tax upon other transportation does not justify the distinction which the Government makes in this case; that is, it does not justify the exemption from tax of the transportation by the Railroad Company and the subjection to tax of the transportation by the Telegraph Company, because both taxes require payment.

Section 501 and section 502 leave no doubt, if section 500 is ambiguous, that payment is a prerequisite to the accrual of either tax, and if payment is lacking in either case no tax arises. Section 501 and section 502 use and require payment as condition precedent to the tax as much in the case of telegrams as in the case of the railroads. The only difference that can possibly be justified is that in one payment is made when credit is extended; that is, paid by the creditor, while in the other payment is not made until actual satisfaction is received. There is no reason whatsoever for imposing the tax in one case where no payment is to be required while in identically the same case subject to the other tax no tax is imposed.

From what has been said, it is clear that the word "charge" has a well-defined meaning common to both the Interstate Commerce Act and Section 500 (f) of the Reve-

nue Act of 1918, and that when there is a mere exchange of service there is no "charge," and as the tax is upon the charge made, it cannot be exacted in this case.

III.

All of the Telegrams Sent by the Western Union Telegraph Company for the Missouri Pacific Railroad Company Were Exempt From the Tax.

(a) **On a proper and fair construction of the statute, there is no charge on any of the service rendered by the Telegraph Company to the Railroad Company, even though the amount of the service was in excess of $75,000.** We have shown that Section 500 of the Revenue Act of 1918 and the Interstate Commerce Act are in pari materia because they relate to the same subjects. The Interstate Commerce Act regulates and controls charges for the transportation of persons and property and for the transmission of telephone, telegraph and wireless messages. It provides for the fixing of these charges and how they shall be published and collected. It is the "charge" established, regulated, controlled and paid under the provisions of the Interstate Commerce Act that is taxed by Section 500 of the Revenue Act of 1918.

The word "charge," as used in the Interstate Commerce Act, has been construed in various decisions of the federal courts to mean a payment in money. We know of no de-

cision to the contrary. Obviously, Congress knew the construction that had been given this word, and when it again used it in section 500 (f) it used it with the same meaning. If there could be any doubt about this it disappears when we consider that the tax is imposed on the very same subjects as are regulated by the Interstate Commerce Act. Congress had that act in mind, because it was taxing the charge on the very same things that were controlled by that act. And as there could be no charge without a money payment, the act provides that the tax shall be paid "by the person paying for the service." All the telegrams sent by the Telegraph Company for the Railroad Company were free from the tax because the Railroad Company never made a payment of money to the Telegraph Company, as the service which it rendered to the Telegraph Company was greater, according to the agreed measure of the respective services, than the services received by it from the Telegraph Company.

Subdivision (c) of Article 46 of Regulations 49, promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, provides:

> "(c) If a telegraph or telephone line or lines along the line of a railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company, under contract, transports commodities necessary to maintain or operate such telegraph or telephone line or lines along the line of such railroad

company, such commodities being intended to be or having been so used, and the railroad company makes no charge for such transportation, the charges which, but for such arrangement, would have accrued on such transportation are exempt from the tax."

This regulation specifically provides that there will be no tax if "the railroad company makes no charge for such transportation." By virtue of said regulation the Telegraph Company paid no tax on the transportation furnished by the Railroad Company to the Telegraph Company under the agreement. The Government admitted there was no tax and did not exact it. We assume that if the Railroad Company had made a charge for the transportation furnished the Telegraph Company the tax would have been imposed. The wording of this regulation leaves no doubt that the tax would have been imposed against the Telegraph Company had it not been for the agreement between the two companies, and that the Government must have considered that the agreement on the part of the Telegraph Company to transmit messages for the Railroad Company in consideration of the Railroad Company furnishing transportation to the Telegraph Company for the purpose of maintaining the telegraph lines was not a charge.

This is clearly shown by the very words of the clause "that charges **which, but for such arrangement,** would have accrued on such transportation are exempt from the

tax." The important words here are "which, but for such arrangement." The arrangement is the agreement to transport commodities necessary to maintain or operate the lines, and where the Telegraph Company gives service in exchange and does not pay money there is no charge.

We admit there was no charge for the transportation service rendered by the Railroad Company for the Telegraph Company. We have said all along there is no charge within the meaning of the Revenue Acts or the Interstate Commerce Act unless money is paid for the service. But where we fail to follow the Government is in its insistence that when the two companies mutually agreed to exchange services there was a charge on the part of the Telegraph Company for the telegrams which it sent for the Railroad Company, hence a tax, but there was no charge on the part of the Railroad Company for the transportation which it furnished the Telegraph Company, hence no tax.

The Government's anomalous position is easily discernible. Of course, it is contrary to reason to contend that no charge accrued on the service rendered by the Railroad Company to the Telegraph Company because of the arrangement had between the two companies to render mutual services, but that charges did accrue on the service rendered by the Telegraph Company to the Railroad Company. If no charge accrued on the railroad transportation, no charge accrued on the telegrams.

(b) **As the tariffs, rates and charges established under**

the Commerce Act do not apply to services under an agreement for the exchange of services, the charge which is taxed under section 500 does not exist. Congress provided in the Interstate Commerce Act, Section 8563 (3), Compiled Statutes U. S. 1916, that all "charges" for the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable shall be just and reasonable, and further provided:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

It will thus be seen that telegrams sent under an exchange of services were freed from "charge" entirely. They could be sent on any basis agreed upon by the parties as long as they constituted an exchange of services. If the Telegraph Company agreed to send an unlimited number of telegrams for the Railroad Company in consideration of the Railroad Company transporting all the supplies, material and men necessary to maintain the telegraph lines, there would be no charge. No charge under the tariffs, rates and charges made by telegraph companies is imposed upon such telegrams.

As the service rendered by the Telegraph Company to the Railroad Company was exempt from tariffs, rates and charges under the Interstate Commerce Act, there was no charge to tax under the Revenue Act of 1918, because we

have seen that in using the word "charge" in section 500 (f) of said act Congress adopted the word from the Interstate Commerce Act, together with the construction placed upon it by the courts in construing the Interstate Commerce Act.

If it be conceded that in a contract providing for an excess of service, where the excess service rendered by either party is to be paid for in money by the other, there is a "charge" for such excess service, and the tax is imposed upon that charge, certainly up to the point where the service rendered by one party offsets the service rendered by the other, according to the manner of reckoning provided for in the agreement, no charge exists upon which the tax claimed by the Government may be imposed. In this case it has been shown that the service rendered by the Telegraph Company never exceeded the service rendered by the Railroad Company.

(c) **The numerous other subdivisions of Section 500 of the Revenue Act of 1918 imposing a tax upon the amount "paid" are associated with subdivision (f) thereof imposing a tax upon the amount of the "charge," and this association of subdivisions requires that that meaning of the word "charge" be accepted which is closest to the word "paid."** In all the subdivisions of Section 500 of the Revenue Act of 1918, except subdivision (f), the taxes are imposed upon the amount **paid** for the transportation of freight, for the transportation of express, for the transpor-

tation of persons, for the transportation of oil by pipe line, and for the transportation of all of the other subjects which are regulated and controlled by the Interstate Commerce Act. It is the tariffs, rates and charges which are established under the Interstate Commerce Act which are taxed under all these subdivisions. The Government admits this. Such charges are only taxed when the amount of the charge is actually paid. Because of the peculiar conditions under which telegrams and telephone messages are sent, the tax upon this charge is imposed when the credit is extended. But telegraph and telephone messages are of the same character as the other items mentioned in section 500. These items all follow one another in their enumeration in that section. The presumption that they are all of the same character, that they refer to the same regulated, established and published tariffs is most persuasive, and is controlling in the absence of a contrary mandate.

It is an accepted rule of interpretation as to taxing statutes that they are to be construed in favor of the tax payer and against the Government, and the rule is well stated by the Supreme Court of the United States in the case of Gould v. Gould, 245 U. S. 153, as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt

they are construed most strongly against the Government and in favor of the citizen (U. S. v. Wigglesworth, 2 Story 369, Fed. Cas. No. 16,690; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; Benziger v. United States, 192 U. S. 38, 55, 48 L. ed. 331, 338, 24 Sup. Ct. Rep. 189)."

See, also:

U. S. v. Field, 255 U. S. 257, and
Smietanka v. First Trust & Savings Bank, 257 U. S. 602.

In U. S. v. Salen, 235 U. S. 237, the meaning of the declaration made by an importer of goods was in question. It was contended that one section of the declaration had a broader and more general meaning than all the other sections. The Court held:

"Seven of the eight clauses (of the declaration) distinctly related to documents. To say that the sixth clause in this enumeration was intended to embrace undefined extraneous matter would be to suddenly depart from the particular to the general and back again from the general to the particular—from the particular subject of documents, to which the attention of the affiant had been specially directed by the first five clauses, into a general field of wider and indefinite scope and—in the seventh clause—again to return to the particular subject of documents. Such an interpretation would give an exceedingly liberal construc-

> tion to a statute defining a felony. It would ignore the fact that the meaning of words is affected by their context and violate the settled rule that words which, standing alone, might have a wide and comprehensive import, will, when joined with those defining specific acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration or class."

See, also:

> Virginia v. Tennessee, 148 U. S. 503;
> United States v. Chase, 135 U. S. 255;
> Neal v. Clark, 95 U. S. 704.

In the Revenue Act of 1918 the tax is imposed upon the amount paid for transportation of passengers and property, including the transportation of oil, and for the transmission of telegraph, telephone and cable messages, and messages by wireless. Every one of these subjects is controlled and regulated by the Interstate Commerce Act and the rates, tariffs and charges to be paid for the service are established with the consent and under the rules of the Interstate Commerce Commission. To rule that the subjects of the tax in all of the other subdivisions, except subdivision (f) of Section 500 of the Revenue Act, are the tariffs, rates and charges (when paid) established under the Interstate Commerce Act, while the charges in subdivision (f) concerning telegrams and telephone messages are not the very same character of things as those taxed

in other subdivisions of said section, is to violate the judicial principles of construction to which the United States Supreme Court refers in the cases cited. To paraphrase its language and its words in United States v. Salen, supra:

> "To say that the sixth clause (of section 500) in this enumeration was intended to embrace undefined extraneous matter would be to suddenly depart from the particular (statutory controlled rates, tariffs and charges) to the general and back again from the general to the particular—from the particular subject of statutory controlled rates, tariffs and charges to which the attention of the officer has been specifically directed by the first five clauses into a general field of wide and indefinite scope and—in the seventh clause—again to return to the particular subject of statutory controlled rates, tariffs and charges."

In United States v. Weitzel, 246 U. S. 533, the statutes controlling national banks granting powers to the Comptroller of the Currency were under consideration. The Comptroller of the Currency has authority, when necessary, to appoint a receiver for any particular bank. Defendant Weitzel was appointed Receiver and later was indicted for embezzlement and making false entries, under Revised Statutes, Section 5209. That section does not mention receivers. It mentions presidents, directors, cashiers, tellers, clerks or agents. The Government contended that a receiver was an agent, within the meaning of the act. The Court held:

"The fact that in this section the words 'clerk or agent' follow 'president, cashier, director, teller' tends, under the rule of noscitur a sociis, to confirm the inference."

So in this case, if the meaning of "charge," as used in section 500 (f), is doubtful, its meaning may be ascertained by reference to the meaning of associated words, or words used in a like connection in the same act. The only words used in a similar connection in the other subdivisions of section 500 is the word "paid," and since "charge" is susceptible of two meanings, when used with respect to commercial transactions, that one of the two meanings must be accepted which more nearly agrees with the meaning of "paid," which eliminates the meaning contended for by the Government and compels the adoption of the meaning contended for by the Railroad Company, that "charge" means those statutory tariffs, rates and charges which are taxed under the subdivisions of section 500, in which the word "paid" is used.

IV.

The Telegrams Taxed Were Exempted by the Revenue Act of 1918.

When Congress passed the Revenue Act, providing for a tax upon messages **to be paid by the person paying for the services**, and excepted services rendered

> "upon transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier," etc.,

and

> "any commodity which is necessary for the use of the carrier in the conduct of its business, as such,"

it had before it the Interstate Commerce Act which had been passed in 1908 and amended in the year 1917, making telegraph companies common carriers to all intents and purposes by the use of the following language:

> "The term 'common carrier,' as used in this act, shall include * * * telegraph, telephone and cable companies operating by wire or wireless."

Subparagraph 3, Section 1, Interstate Com. Act.

And Congress also had before it the exception contained in subparagraph 5, Section 1 of the Interstate Commerce Act, as follows:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services,"

and the following portion of subparagraph 7, Section 1 of the Interstate Commerce Act:

"Provided that this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employes of common carriers and their families; * * * and provided, further, that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof with each other for the officers, agents, employes and their families of such telegraph, telephone and cable lines, and the officers, agents, employes and their families of other common carriers subject to the provisions of this act."

When the Interstate Commerce Act is read, in connection with the exceptions contained in the Revenue Act that the tax shall not apply upon the commodities or services rendered by common carriers, and the tax upon telegrams is confined wholly to payments made

"by the person paying for the services or facilities rendered,"

it should be apparent that the provision known as Article Nine of Regulations 57 of the Commissioner of Internal Revenue was wholly outside his jurisdiction, in attempting to impose a tax upon this exchange service of common carriers, which was clearly authorized by the Interstate Commerce Act and excepted from the General Revenue Act of the Government.

It is an accepted rule of interpretation as to taxing statutes that they are to be construed in favor of the tax-

payer and against the Government, and the rule is well stated by this Court in the case of

Gould v. Gould, 245 U. S. 153,

as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen (U. S. v. Wigglesworth, 2 Story 369, Fed. Cas. No. 16,690; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; Benziger v. United States, 192 U. S. 38, 55, 48 L. ed. 331, 338, 24 Sup. Ct. Rep. 189)."

See, also:

U. S. v. Field, 255 U. S. 257, and
Smietanka v. First Trust & Savings Bank, 257 U. S. 602.

In justifying Article 9 of Regulation 57, the Internal Revenue Department must, of necessity, attempt to resolve the consideration for the free messages to a cash denominator, and thereby invoke paragraph F, section 500, which provides for the transmission of messages:

"Of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents a tax of ten (10) cents."

The position taken by the Revenue Department is thus outlined in its brief filed in the case of Western Union Telegraph Company v. D. L. & W., 282 Fed. 925, to wit:

"But it is contended that although such services are rendered for hire, the tax does not apply because it cannot be said that there was a charge of over 14 cents for each of such messages. It might be conceded there would be some force to this argument, were it not for the fact that the services in this case were rendered upon an agreed valuation of such services in dollars and cents. The charge in this case was not only computable in dollars and cents, but was in fact computed on this basis at the time the contract was executed. When the time for settlement came the only computation required was an application of the regular commercial rates to the various messages transmitted."

The regulations of the Department, as they stand, impute to Congress the unfair discrimination in favor of free transportation and against free messages. From the viewpoint of abstract justice we can see no possible justification for such discrimination, and, as Congress has not specifically provided that such messages must be taxed, we feel that it is not even discretionary with the Commissioner's Department to so interpret the act.

As said in **Rockefeller v. O'Brien, 224 Fed. 541:**

> "A taxing statute must be construed as part of the legislative taxing system of the state, and if there is any doubt as to its meaning the construction must be strict and the doubt resolved in favor of the citizen."

These provisions regarding the free allowance of telegraphic service and free transportation of men and materials were before the Supreme Court of the United States in the case of Postal Telegraph Cable Co. v. Tonopah & Tide Water R. R. Co., 248 U. S. 471, 62 L. Ed. 365. The Interstate Commerce Commission had ruled that, so far as "off the line" services were concerned, full tariff rates must be collected for all telegrams sent and all transportation furnished. The Supreme Court held this ruling to be in error, saying:

> "The contracts elaborately provide for the reciprocal rights of the companies for a division of expenses between the railroad and telegraph, for the use by the telegraph of the railroad's right of way for its poles, for monthly payment of a certain sum by the telegraph, and then agree, this being the point now material, that up to a certain amount, calculated at the regular day rates of the telegraph, it should deliver free of charge messages pertaining to the railroad business, to any points on its system on or beyond the railroad lines, and that, up to an amount calculated in similar manner, the railroad should

transport the materials, supplies and employes of the telegraph needed for the construction, maintenance or renewal of the telegraph lines, whether on or off the lines of the road. The latest ruling of the Interstate Commerce Commission is that these contracts for an exchange of services, while valid for services on the line, are invalid as to services off the line, which last, it is held, must be charged for by the railroad upon the basis of its published rates, and by the telegraph upon that of its charges reasonably charged to other customers for similar services. * * * it is said that * * * the exchange of services off the line must be on the terms that we have stated, which makes the act as to them merely a superfluous permission to settle accounts periodically instead of paying for each transaction in cash. **But 'exchange' is barter, and carries with it no implication of reduction to money as a common denominator.** It contemplates simply an estimate, determined by self-interest, of the relative value and importance of the services rendered and those received. * * *

"The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute. **No one knows which of the two would be found to be preferred as having the best of a very complex bargain. All the great benefits derived on one side are the consideration for all those conferred upon the other.**"

We submit that the Commission, in the ruling disapproved of by the Supreme Court of the United States in

The contract between the Telegraph Company and the Missouri Pacific was made in the year 1911, long before the enactment of the Revenue Act of 1918. It was a contract made in good faith by the parties, and with no purpose of evading any obligation to the state or Government. It was a contract the parties had a right to make. The provisions of the Revenue Act passed in 1918 should not, therefore, be extended, by construction, so as to impose a tax upon telegraphic messages transmitted under the provisions of this contract, unless such messages are clearly covered by the law itself.

The true rule of construction in such cases is the one announced by the Court in the case of

In re Temtor Corn & Fruit Products Co., 299 Fed. Rep. No. 1, Aug. 28, 1924, p. 326.

The statute involved in that case provided that a consolidated return should be made when one corporation was affiliated with another," and the Commissioner of Internal Revenue had construed that language to mean ninety five per cent (95%) of the stock.

The Court, in passing upon the facts, said:

> "The statute also provides that the Commissioner of Internal Revenue shall require consolidated returns from affiliated corporations under regulations which he is empowered to prescribe. But the question of the fact of affiliation is left, by the very defini-

tion of what constitutes affiliation, even in the statute itself a matter of judicial construction, and not a matter of administrative or departmental regulation; for the language of the section is:

> "'That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner, * * * make a consolidated return.'

"Further on in this section there is a statutory definition of what constitutes affiliation. So it is too obvious for argument that it is not left to the Commissioner to prescribe what constitutes affiliation, for the statute fixes that, but what is left to be prescribed by the Commissioner's regulation is the manner of the making of the return. In short, the law itself says **who** shall make a consolidated return. The Commissioner may only say **how** such return shall be made.

"The Commissioner, then, had no power to say, as he has said by his regulation, that 'substantially all of the stock of the other' means '95 per cent of the voting stock.' It is a matter for the courts to construe, and not a matter about which the Commissioner may promulgate a regulation binding upon the courts."

In the case of

Merritt v. Cameron, 137 U. S. 551,

the Court held that

> "A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute

by a department, charged with its execution, to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time."

This is particularly true as to an interpretation of a revenue act for the reason that all revenue acts are construed strictly against the Government and in favor of the citizen.

Gould v. Gould, 245 U. S. 153.

In

Niles, Collector, v. Mutual Insurance Co.,
252 Fed. 564,

the suit was to recover taxes paid under protest, where the plaintiff, as a mutual insurance company, had collected cash premiums in advance, which were sufficient to cover unearned premium reserves and a surplus in excess of the reserve, which was put out at interest. The Commissioner of Internal Revenue, under his regulations, held that these cash premiums were subject to the tax and did not come within the exemption of co-operative companies, but the Court of Appeals of the Sixth Circuit held that the earnings of the company on this surplus were merely incidental and that

"the object of the business in each class is not to undertake investments on behalf of the members, but solely to protect more effectively the members' property. * * * A mere incidental profit earned by way of interest on its invested safety funds, or on its bank balance, does not change the purely mutual character of the company, or indicate that its business, though thus earning a profit, is 'carried on for profit.'"

This reasoning applies to the exchange service rendered by the Telegraph Company and the Railroad Company in this case, for there was not only no profit made thereon, but no payment at all made therefor; both companies were authorized by the Interstate Commerce Act to exchange such service, and the Revenue Act excepted such service, so necessary in the business of the common carrier, from the federal tax.

The mutual exchange of services by the Telegraph Company and the Railroad Company, under the authority of the Act to Regulate Commerce, fell clearly within the exception of the revenue law, and Regulation No. 57, Article IX, of the Commissioner of Internal Revenue was beyond and outside the scope of his authority.

The agreed statement of facts admits that the amount sued for is the amount which the Railroad Company is entitled to recover, in the event the finding should be in its favor, and we submit that the judgment of the District Court should be reversed and that of the United States Circuit Court of Appeals affirmed.

Respectfully submitted,

JAMES F. GREEN and
EDW. J. WHITE,
Counsel for Missouri Pacific
Railroad Company.

IN THE

Supreme Court of the United States

October Term, 1907.

Abram J. Hemmens, Collector of Internal Revenue, Petitioner,
vs.
Manufacturers Packing Company, Respondent.
No. 897.

MOTION FOR LEAVE TO FILE BRIEF

AND

BRIEF OF FRIENDS OF THE COURT.

Kenneth Brewster,
James A. T. Lyons,

January 17, 1907.

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IN THE

Supreme Court of the United States

October term, 1926.

ARNOLD J. HELLMICH, Collector of Internal Revenue, *Petitioner*,
vs.
MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*.
No. 307.

MOTION FOR LEAVE TO FILE BRIEF.

To the Supreme Court of the United States:

The undersigned respectfully move that they be given leave to file the annexed brief, as friends of the Court, for the following reasons:

This cause involves the question of the taxability, under Section 500 of the Revenue Acts of 1918 and 1921, of certain telegraph messages transmitted by the Western Union Telegraph Company under a contract with the Missouri Pacific Telegraph Company for mutual interchange of services. A similar question is involved in a suit now pending in the Court of Claims between the Boston and Maine Railroad, for which the undersigned are of counsel, and the United States, proceedings in which have been suspended pending the decision of this Court in this cause, for the reason that the decision here may be controlling in said suit. The Boston and Maine Railroad will therefore be materially affected by the decision in this cause, and has requested the undersigned to file a brief herein showing the reasons why we believe that the judgment below should be affirmed.

KINGMAN BREWSTER,
JAMES S. Y. IVINS.

January 17, 1927.

the United States, and proceedings therein are suspended pending the decision of this Court in the *Missouri Pacific* case, in which this brief is filed by counsel for the Boston and Maine Railroad, as friends of the Court.

The Facts.

The facts in the case at bar seem to be correctly stated in the Government's brief, pages 2-8, and will not be repeated here.

The Statutes.

The Revenue Act of 1918 provides:

> "Sec. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by Section 500 of the Revenue Act of 1917
>
> * * * * * * * *
>
> "(f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents. *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and
>
> "(g) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a com-

mon carrier or telegraph or telephone company, of its business as such;

* * * * * * *

"SEC. 501. (a) That the taxes imposed by Section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * * * *

"(c) The taxes imposed by Section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. In case a carrier (other than a pipe line) principally engaged in rendering transportation services or facilities for hire does not, because of its ownership of the goods transported, or for any other reason, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such goods if the carrier received payment for such transportation, such tax, if it can not be computed from actual rates or tariffs of the carrier, to be computed on the basis of the rates or tariffs of other carriers for like services as determined by the Commissioner. In the case of any carrier (other than a pipe line) the principal business of which is to transport goods belonging to it on its own account and which only incidentally renders services for hire, the tax shall apply to such services or facilities only as are actually rendered by it for hire. Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

* * * * * * *

"Sec. 502. That each person receiving any payments referred to in Section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of Section 501 to the collector of the district in which the principal office or place of business is located.

* * * * * * *

"Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so repaid may be credited against amounts included in any subsequent monthly return. * * *"

The Revenue Act of 1921 contains provisions similar to the first clause of Section 500, quoted above (in lieu of the provisions of the 1918 Act and beginning January 1, 1922), to subdivisions (f) and (g) of Section 500 (§500, subdivisions (a) and (b)), to subdivision (a) of Section 501 (§501 (a)), and to the portions quoted above from Section 502 (§502, subdivisions (a) and (c)).

SUMMARY OF POINTS.

I.

Article 9 of Regulations 57 is an improper construction of the statutes and is invalid.

It is based upon a false conception that the statute intended to tax telegraph messages upon the usual charge to the public rather than the actual money price paid by the particular sender.

II.

The statutes impose no tax on telegrams sent under a contract for exchange of services.

The omission to tax messages sent under such contracts was deliberate.

III.

The calculation under the contract of the number of messages to be carried free by reference to established schedules of rates does not render such messages paid messages nor render them taxable.

There is no basis for a tax upon equivalents.

ARGUMENT.

POINT I.

Article 9 of Regulations 57 is an improper construction of the statutes and is invalid.

Article 9 of Regulations 57, under which the taxes discussed were exacted, interprets the pertinent provisions of the statutes in the following language:

> "Messages transmitted under contract. Where, by contract, a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section [500 (f)] of the act. The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of a common carrier and whether they are 'on line' or 'off line' are im-

> material. Thus, a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business 'free' and all such messages over its lines off the railroad lines 'free' to an amount not exceeding $10,000 per year calculated at its regular rates, and all messages over that amount at half rates, in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether 'on line' or 'off line,' and whether 'free' or at half rates, are subject to the tax provided by this section [500 (f)] of the act. The tax must be computed, collected, and paid upon each such message. * * *"

The very face of the regulation—the hypothetical case given in it—shows a misconception on the part of its framer of the purpose of the statutes.

The intent of the statutes was to base the telegram tax on the *price paid* for transmission, rather than on the value of the service received.

But the regulation provides for computing the tax upon the amount of the regular established charge for service rendered to ordinary customers, regardless of what was actually paid. There is nothing in the statute to justify such a regulation.

If a telegraph company were at liberty to deal with each customer separately, fixing different rates for different customers, as a liveryman may do, it could make special rates for favored persons. One paying less than 14 cents for a message would be subjected to no tax, even though others were charged more than 14 cents for a similar message, and paid taxes. The tax is based upon the charge *to the particular person sending the message*, not upon the charge to others, the usual charge, or the published tariff charge.

Telegraph companies may not charge one merchant at one rate and another at another, but they are specifically authorized by subdivisions 5 and 7 of Section 1 of the Interstate Commerce Act to make contracts with common carriers for interchange of services, interchange of franks, etc.

If Congress had intended to impose a tax upon free messages, reduced rate messages, messages sent in exchange for services, as well as upon messages paid for at usual rates, basing the tax upon the usual rate regardless of the amount actually paid, it would have specifically so provided. In other parts of the Revenue Acts of 1918 and 1921, Congress did make provision for taxing one thing or another on the basis of value received or value given rather than cash paid, in order to tax those receiving benefits for which they paid less than current prices, or nothing, or for which they gave value other than in money, at the same rates as if they had paid cash at usual rates.* The failure

*In the Income Tax provisions, Congress was careful to provide specifically that dividends paid in stock should be treated like dividends paid in cash (§201, (a)), that property received should be treated as the equivalent of cash to the amount of its fair market value (§202, (b)), that compensation received should be included in gross income "of whatever kind and in whatever form paid" (§213, a). In the tax on admissions and dues it was provided that persons admitted free or at reduced rates should be taxed at the same rates as those paying full price (§800, a, 2), that persons having the permanent use of boxes or seats should be taxed at the rates charged others for similar accommodations for single performances (§800, a, 5), that life members of clubs should pay the same taxes

to make any such provision with respect to the telegraph tax is clearly indicative of an intent that the purpose here was otherwise. Such exception is highly reasonable, for the only persons with whom telegraph companies may deal, otherwise than on the basis of established tariffs, are common carriers—and the purpose of Congress to permit common carriers to avail themselves of telegraph service, in connection with their regular business, without paying taxes therefor is exemplified by the exception in subdivision (g) of Section 500. Nobody but a common carrier could evade the tax by making a contract to pay otherwise than in money, and Congress deliberately intended to favor carriers. Certainly "the charge" in the statute means the charge to the taxpayer—not the charge to somebody else.

In the mind of the framer of the regulation it mattered not whether a message was paid for at regular rates, at half rate, in cash or in kind, in commodity or in privilege, or not paid for at all—the tax should be com-

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as annual members (§801). In the excise tax it was provided that manufacturers selling both at wholesale and retail should be taxed on retail sales upon the basis of wholesale prices (§ 900), that manufacturers, etc., selling, leasing or licensing taxable products at less than the fair market price should be taxed on the basis of fair market prices (§901). In the stamp tax it was provided that no-par stock should pay the same capital stock tax as $100-par stock (Art. IX, Schedule A, 3), similarly with the stock transfer tax (Schedule A, 4), and that the tax on conveyances should be imposed when either the consideration or the value of the interest in property conveyed exceeded specified amounts.

puted by reference to established rates ordinarily exacted of non-preferred customers.

He probably had in mind a thought that telegraph rates *should* be uniform—though the example he gave in the regulation showed that he knew they were not.

If, for reasons which it regarded as sufficient, a railroad had agreed to pay, and had paid twice the regular rate for telegrams, we greatly doubt that the Treasury Department would have computed the tax on the regular rate rather than on the actual charge.

The theory that the tax should be based upon the usual charge or an ideal charge, and not on the actual charge, is as absurd as would be the assessment of the same income tax against every citizen of the United States on the theory that the Constitution regards them as equal and therefore their incomes should be equal.

In the Government's brief (page 22) it is admitted that the difficulties in calculating the tax in hypothetical or actual cases do furnish some argument against the Government's position, but it is urged that the solution presented by the Regulation seems to be sound, in requiring the use of established rates for computing taxes on messages where established rates were not paid. The very statement of the proposition brands it as an example of administrative legislation—an attempt by the Treasury Department to impose taxes where Congress omitted to provide for them.

If a tax upon telegrams is to be computed by reference to the usual rates charged others, regardless of actual charges to the particular taxpayer, it must be because the statute so provides, not because the drafter of a regulation thinks that would be an easy way to compute a tax where the statute makes no provision for its computation. The taxpayer is entitled

to a strict construction of the statute. Legislation—even "interstitial legislation," as the filling in of gaps in a statute has been aptly called—is the function of Congress, not of the Treasury Department.

The regulation can not be said to be a long accepted departmental construction. The telegraph tax was first effective, under the Revenue Act of 1917, on November 1, 1917. Two months later the railroads were taken over by the Government, which held them until March, 1920. Meanwhile the Revenue Act of 1918 was passed. The Revenue Act of 1921 followed in November, 1921. But it was not until 1923 that the Treasury Department asserted the taxes in litigation, and similar taxes against other railroads. At the time of passing the Revenue Acts of 1918 and 1921 the railroads had had no occasion to attack or question the Regulations, and Congress can not be presumed to have intended to ratify them and to settle by anticipation a controversy that did not exist. The reenactment of the statutory provisions can not be interpreted as a legislative construction.

Point II.

The statutes impose no tax on telegrams sent under a contract for exchange of services.

Subdivision (f) of Section 500 of the Revenue Act of 1918 (as under the 1921 Act), imposes a tax on messages "for the transmission of which the charge is more than 14 cents." It imposes no tax upon messages for the transmission of which the charge is less than 14 cents, or for the transmission of which there is no charge, or for the transmission of which compensation is made otherwise than in money. For reasons given on pp. 9 and 10 above, this omission must be presumed to have been intentional.

The word "charge" in the statute must be taken in its commonly accepted meaning. As a verb, that word means to exact payment. As a noun, it means the amount of payment exacted. In some contexts, the word may mean a book entry, debiting a certain sum—for example in the contract between the Missouri Pacific Railroad and the Telegraph Company where it provides, "Such service * * * shall be charged for at * * * regular current telegraph rates" (R. p. 16), the context showing that payment is not to be made.

But in the statute the word is not used to indicate a mere book entry or the making of a book entry. The context makes it perfectly clear that the word means a payment exacted. If subdivision (f) stood alone there might be room for argument that the word referred to a book entry and that the law intended that a message, for which a bookkeeping entry in excess of 14 cents was made, should be taxable, even though no money payment were contemplated. But this subdivision does not indicate who shall be liable for the tax. Standing alone, it would not have the effect of rendering anybody liable for the tax. We must look to the next section to see who is liable for the tax, and Section 501 says, "the taxes * * * shall be paid *by the person paying* for the services." If nobody *pays* for the services, there is nobody from whom the tax is collectible. Similarly Section 502, in providing for the collection of the tax, says "each person *receiving any payments* * * * shall collect the amount of the tax, *if any* * * * from the person *making such payments.*" Where no such payments are made, nobody is subjected to the duty of collecting any tax and nobody is subjected to the duty of paying any tax.

A tax *in rem* may be imposed upon a tangible thing,

assessed against it, and collected by proceedings *in rem* against it without the designation of any person liable for it. But this tax, obviously, can not be collected in that manner. In the absence of a person made liable for the tax, there could be no proceedings *in rem* against a telegram. And it would be as easy to argue that it should be paid by the person receiving it, or the person transmitting it, as that it should be paid by the person filing it for transmission. As a matter of fact, none of them is made liable for a tax upon a message for which no payment in excess of 14 cents is actually made.

While Section 500 (f) bases the tax upon the charge made by the telegraph company, the provisions of Section 502 make it clear that the tax is collected by reference to the payment if the charge and the payment differ, with provision for refund of tax where there is a refund of payment. If the corporations had entered into a contract whereby the telegraph company was to charge the railroad company upon its books with messages at regular rates but to collect only half the amount of such charges,* we do not believe there is any room for argument that the tax should be computed by reference to the amount paid and not to the deliberately false book entries. A charge that is not intended to be collected is not a basis for the tax. Under such a contract, messages for which the regular charge would be twenty-five cents,

*This was true with respect to "excess" messages under the Boston and Maine Railroad's contract, the contract considered in *Delaware, Lackawanna & Western R. R.* v. *Bowers* and *W. U. Tel. Co.* v. *D. L. & W. R. R. Co.* (relied upon by the Government), and the hypothetical contract in the Regulation.

would only cost the railroad twelve and a half cents each, and would not be taxable—for there is no tax on messages for which the charge is fourteen cents or less.

Even if it had been agreed between the railroad and the telegraph company that the latter should *charge* the former for every message, and the former should *pay* the amount charged *in cash*, but the latter would refund the payment, there would be no tax, for even if a tax were exacted by the telegraph company from the railroad at the time of payment for messages, it would be refunded at the time of repayment, under Section 502.

The statute clearly intends that the tax shall only be collected upon messages *paid for*. It measures the tax, to be sure, by the amount "charged," but recognizes that this means not the amount originally entered upon an account, but the amount finally collected *and* retained by the telegraph company, a refund of any amount paid cancelling *pro tanto* the original book entry.

The "charge" for a message is clearly intended to be the amount which the person filing the message actually *pays*—not the amount which it *would* have to pay if it did not have a contract for special rates, or a contract for exchange of services, nor the amount which somebody else, having no contract, would have to pay.

As shown on p. 10, where a tax is imposed by reference to a cash basis, and Congress intends to tax other matters or transactions, not involving cash, on something else as the equivalent of cash, it says so. Its failure to say so in respect to the telegraph tax shows the absence of such intent.

The fact that the railroad company gave value for its telegrams, in transportation services rendered (computed at regular rates) and in many other ways (not

in the final analysis, the test of the matter is whether such constructive payment *does* constitute gross income to the other party. It is difficult to perceive how anything more accrues to either party than a mere benefit or advantage resulting from the contract, whereby each has agreed to perform services without charge. One or the other of the parties can *gain* from the contract, and gain alone is income (*Eisner* v. *Macomber*, 252 U. S. 189), only to the extent that the value of services rendered to it (at published rates) exceeds the value of services rendered *by* it (at published rates) for the reason that until the $75,000 limit is reached, each party is contributing to the other its bare *cost* of service, although the $75,000 limit includes a theoretical profit based upon the published rates. All that the use of published rates can accomplish, is to hasten the time when payments actually can be demanded with the inclusion therein of any profits in excess of cost.

In that situation it is not apparent that either party has derived income or gain from the transaction. They have merely agreed to postpone the time when they might *gain* from the use of each other's services. Until then, each is merely performing a contract obligation which *relieves* the other from making any payment. We submit that the contractual relief from an obligation *to pay* is not the equivalent of payment so as to constitute income or gain to the one who is so relieved from the obligation. If the contrary were true then a bankrupt would have income upon his discharge in bankruptcy to the extent of the debts from which he was relieved.

Point III.

The calculation under the contract of the number of messages to be carried free by reference to established schedules of rates does not render such messages paid *messages nor render them taxable.*

By the terms of the contract between the Missouri Pacific Railway and the Telegraph Company, the latter agreed to perform telegraphic service to be authorized by franks, and the railway company agreed to perform transportation service for the telegraph company. The contract provided that each company should charge the other at current rates and send bills at the end of each year but that no payment was to be made except with respect to any excess of such charges over $75,000. If the charges on both sides exceeded $75,000, the difference only should be paid. This was merely a method of agreeing upon the extent to which each company would render free service to the other—the quantity of free service which each undertook to perform without any compensation other than the service to be rendered by the other.

Reference to some schedule was necessary as a practical matter in drawing such a contract, unless the parties wished to insert in the contract a vast mass of tables. This necessity arose from the fact that the value of telegraphic service is never estimated on a flat word-mile basis, and the value of transportation service by railroads is never estimated on a flat pound-mile basis. If telegraphic service were ordinarily paid for on a word-mile basis, and transportation on a pound-mile basis, without variations of rate intended to cover address and signature, cost of sending and receiving, and delivery, as well as maintenance of wires, in the case of telegrams, and similar variants in the

case of freight, the companies would undoubtedly have made a contract somewhat as follows: The telegraph company agrees to render service to the extent of 750,000 word-miles, and the railroad company agrees to render service to the telegraph company to the extent of 750,000 ton-miles, each without charge to the other. Any services rendered beyond the quantity so agreed upon shall be charged and paid for at regular rates. From such a contract no implication could be drawn that the services, being rendered free, were regarded as the equivalent of cash to any specific extent. The exchange might be at regular rates, at one-half regular rates, or at twice regular rates. But neither telegraph companies nor railroads estimate the cost or value of their service at flat word-mile or pound-mile rates, so it was necessary for them in their contract to arrive at a common denominator in order to estimate the *relative* values of services given and services received.

Had the contract provided that the service performed by either party for the other should be charged at one-tenth of regular current rates and billed accordingly, but that only services so billed in excess of $7,500 should be paid for, it would have amounted to exactly the same thing as the contract that was signed, as far as the exchange of services without payment is concerned. The same would be true if the contract had called for charging and billing at ten times regular rates.

The prices to be actually paid for services in excess of the free maximum do not constitute a basis for appraisal of the services exchanged. There are many instances of contracts between railroads and telegraph companies providing that services shall be exchanged up to a specified quantity, to be measured by specified rates,

services in excess to be paid for at entirely different rates.

Two manufacturers of automobile accessories, taxable at 5% under the Revenue Acts of 1918 and 1921, might agree to exchange their products, arriving at an estimate of equivalent values by charging retail rates, where they normally would have bought and sold, in the absence of such a contract, at wholesale. Or, because of a greater margin between wholesale and retail in the case of one than in the case of the other, they might arrive at a common denominator by the process of making the book entries at four times retail for one and five times retail for the other. But it is patent that such an arrangement would not constitute, for tax purposes, a sale at such prices.*

Railroad companies and telegraph companies in their dealings with each other need not conform to established tariffs but are left at liberty to make contracts for exchange of services. Such contracts might well be drawn without any reference to money or to regular rates as far as the law is concerned. It is merely the fact that the contracts would have to be so voluminous and so intricate, if drawn without resort to money and regular rates as denominators in computation, that has caused the contracts to take their customary form. This of itself should not render them taxable on the basis of the common denominator agreed upon.

As this Court said in *Postal Telegraph-Cable Company* v. *Tonopah & Tide Water R. R. Co.*, 248 U. S. 471:

*The sale would be taxed at usual wholesale market prices, not by reason of any regulation or implication, but under the specific provisions of Sections 900 and 901 of the Revenue Act of 1918, without which provisions there could be no tax.

> "but 'exchange' is barter and carries with it no implication of reduction to money as a common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received."

And where two corporations agree to exchange services for services, the mere fact that they measure the services to be given and the services to be received on the yard-stick of usual rates, does not transform the barter into a sale for cash at those rates.

Under subdivision (f) of Section 500 of the 1918 Act (subdivision (a) in the 1921 Act) no tax is imposed upon any message for the transmission of which the charge is 14 cents or less. Unless a charge of more than 14 cents can properly and legally be attributed to a given message, there can be no tax on that message. Except by assuming that each message has been paid for at current rates, no definite charge can be attributed to any message. The messages were *not* paid for at current rates. They were exchanged for services performed by the railroad company. If it had happened that the railroad company was only called on by the telegraph company to transport one-tenth of the expected amount of freight during the year, and transportation were appraisable at current rates for the purpose of treating it as the equivalent of cash when given in exchange for telegrams, obviously the railroad company would have paid only the equivalent of $7,500 for services of the telegraph company, for which the normal charge would be $75,000. The average cost to the railroad company of each message would be only one-tenth of the usual telegraph rates, and hardly any of the messages would be taxable, messages costing less than 15 cents being exempt.

The statute intended to tax paid messages, by reference to the amount of money paid, *each message being a separate base of taxation*. The railroad company was required to pay what the Government would have us regard as the equivalent of $75,000, whether it sent any messages or not. If it only sent one message, but the telegraph company called on it for transportation up to the maximum covered by the exchange provisions, under the Government's theory that message could only have been taxed 10 cents, the statute providing a flat rate of 10 cents for any message for which the charge was more than 50 cents. This tax would accrue upon the sending of the message, not at the end of the year. The mere fact that the limitation upon the amount of "free" messages was fixed by reference to regular rates, and $75,000, does not mean that every message was compensated for at regular rates. If there had been no maximum but the railroad company had undertaken to handle all the telegraph company's transportation, and the telegraph company had undertaken to handle all the railroad company's telegrams, it is obvious that there would have been no basis for attributing any specific price to any message. And there could be no basis for computing any tax. Does the mere fixing of a maximum amount of facilities which will be exchanged so alter the nature of the arrangement as to furnish a basis for a tax?

In *Postal Telegraph Cable Co. v. Tonopah & Tide Water R. R. Co.*, 248 U. S. 471, this Court pointed out that the contract contained many mutual considerations beside the exchange of telegraphic and transportation services. The record in the case at bar does not show all the various things the respective companies agreed to do for each other without charge. But it is apparent that the telegraph company was obligated

to do more than merely transmit messages, just as the railroad was required to do more than furnish transportation. The Government entirely ignores these additional considerations and assumes that the furnishing of transportation was compensated solely by the transmission of telegrams. There is no basis for such assumption.

It may be that installing and maintaining wires, telegraph stations, etc., for the convenience of the railroad was largely compensated by transportation. There is no way of allocating any definite value given by one company to any value given by the other. Such being the case how can we allocate a definite price, in cash or in kind, to any one telegraph message? And the statute contemplates the separate taxation of each taxable message. As the Government's brief points out (p. 15) contracts of this type are common and well known to Congress and the Courts. Congress must have known that under such a contract it would be impossible to find even an equivalent to cash, to be attributed to each telegram. And knowing this, if it had intended a tax on messages sent under such a contract, it would have provided specifically for a means of computing it—as it did with respect to leased wires under Section 500 (g) of the Revenue Act of 1918 (500 (b) of the 1921 Act). It did provide for taxing leased wire contracts, and made a specific exemption to common carriers. It did not provide for taxing contracts for exchange of facilities—the omission undoubtedly being deliberate and based upon the purpose of exempting the carriers operating under such contracts as well as those using leased wires.

As the Government's brief (p. 15) indicates, Congress and the courts have recognized the difference between compensation in cash and compensation in kind.

and do not regard the latter as equivalent to the former. This being the case, messages compensated for in kind can not be taxed under a statute providing for a tax only upon messages paid for in money, under any theory of equivalents.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

JAMES S. Y. IVINS,

KINGMAN BREWSTER,

Of Counsel for

BOSTON AND MAINE RAILROAD.

SUPREME COURT OF THE UNITED STATES.

No. 507.—October Term, 1926.

Arnold J. Hellmich, United States Collector of Internal Revenue, Petitioner, vs. Missouri Pacific Railroad Company.	Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 21, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The Missouri Pacific Railroad Company brought this suit in the United States District Court for the Eastern District of Missouri against Hellmich, U. S. Collector of Internal Revenue, to recover taxes amounting to $14,792.95, paid by it under protest, for the transmission of telegraph messages from March, 1920, to January, 1923, inclusive. The messages in question were transmitted under the terms of a contract dated October 24, 1911, for the exchange of services between the Western Union Telegraph Company, on the one part, and the Missouri Pacific Railroad Company and the St. Louis, Iron Mountain & Southern Railway Company, on the other part. To the rights and obligations of these two railway companies the respondent company, the Missouri Pacific Railroad Company, succeeded. The question of the legality of the taxes arises under two acts of Congress. The first is the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1101 and 1102, which provides in its section 500,

"That from and after April 1, 1919, there shall be levied, assessed, collected and paid, in lieu of the taxes imposed by Section 500 of the Revenue Act of 1917—

"(f) In the case of each telegraph, telephone, cable or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents, and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of

10 cents: Provided, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation.

"Section 501 (2). That the taxes imposed by Section 500 shall be paid by the person paying for the services or facilities rendered."

The second is the Revenue Act of 1921, c. 136, 42 Stat. 227, 284, sections 500 and 501 of which contain exactly the same language as that just quoted from the Act of 1918.

The District Court held that the messages here in question came within these sections and gave judgment for the Government. The Circuit Court of Appeals of the Eighth Circuit reversed the District Court, holding that the telegraph messages up to the amount of $75,000 annually thus taxed were exempt, but that those in excess of that amount were subject to the tax.

The point in the case is to determine whether these messages can be construed to be messages for the transmission of which there can be said to be a charge. The contention of the railroad company is that in the sense of this section 500, the messages in question are not charged for at all, that they can not be fitted into the section, so that it can not be construed to cover them. We must, therefore, consider the contract under which the messages for the railroad company were sent by the telegraph company. The contract was dated October 24, 1911, and is of indefinite duration. By its fourth paragraph, the telegraph company agrees to perform, for the railway companies, telegraphic service between points on its lines in the United States, either on or off the lines of the railways covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, under franks issued to their officers and agents permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company. The railway companies agree to perform promptly such transportation and distribution service over their railroads as the telegraph company may require for its employees, supplies, and material, whether for work or use along the railroads or beyond or off their lines, and to furnish special trains, engines, crews and equipment for distribution service and outfit, boarding and tool cars for work on their lines, whenever required by the telegraph company. The transportation of employees is to be authorized by

passes to be issued by the railway companies on authorized request. The service performed by either party for the other is to be charged for at its regular current telegraph rates, or its through or local transportation rates, as the case may be, for the class of services rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, are to be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding 25 per cent. of such cost. At the close of each contract year, bills are to be rendered by each party to the other for all services performed by each party for the other during such year. If the bill therefor rendered by either party to the other exceeds the sum of $75,000 in any contract year, the party receiving such service is to pay to the party rendering the same the amount of such excess, provided that in the event the services of both are in excess of $75,000 in any contract year, the party in arrears is to pay to the other party the difference between the amounts of such accounts; and if the bills rendered by each party to the other for such services in any contract year do not exceed $75,000, there is to be no payment by either party to the other therefor.

By the fifth paragraph of the contract, it is provided that the telegraph or telephone operators of the railway companies at stations where the messages are less in number than 3,000 a year, are to act as the agents of the telegraph company and receive and transmit them, charging the tariff rates and rendering to the telephone company monthly statements of the business, and are to pay the receipts therefor to the telegraph company, but the railway companies are not to be liable for receipts thus to be received and paid over. The railway operators and employees in such service are to conform to the rules and regulations of the telegraph company. They are not to transmit over the wires of either party any free messages except those of the railway company's business. For messages transmitted for it by the employees of the railway company the telegraph company agrees to pay the railway companies 10 per cent. of the gross cash receipts, except on ocean cable messages, receipts for which are to be retained in full by the telegraph company.

Pursuant to the authority vested in him by the Revenue Acts, the Commissioner of Internal Revenue, with the approval of the Treasury, promulgated Article IX of Regulation No. 57 of the

sation to be paid by each for the service of the other would not average more than the same sum. The contract was a contract for many years, the amount of the service on the one hand and on the other might vary from year to year, but year in and year out the two companies felt that $75,000 would be a safe sum for both. In exceptional years if either had the advantage beyond $75,000, this should be made up for by the actual payment of cash for the excess of the party earning it.

In argument, extreme instances for a single year were supposed such that as between the two contracting parties no transportation would be furnished and so no compensation would be received by the telegraph company for the messages actually sent by it. Such a hypothesis is not a test of the actual equilateral character of the contract in its reciprocal obligations. $75,000, in the experience and judgment of the parties, measured the probable annual need of each for the service of the other. This was deemed a fair balance between the two, agreed upon for their mutual convenience of settlement. The contract was made long before the income tax was imposed, and we must treat it as having been the result of transactions of previous years and justified by similar experiences of other railroads and telegraph companies. Such contracts between railroads and telegraph lines were and are very frequent. *Postal Telegraph and Cable Company* v. *Tonopah Railroad Company*, 248 U. S. 471. The payment of charges for telegrams or shipments or other services was a mere substitute for the payment of the money down at the time each message was sent or each shipment made or other service was performed. Certainly no one would say that because a patron of the telegraph company paid his bills once a year, it rendered them free from taxation. The arrangement here is not substantially different. The payment for the messages, i. e., the charge for them to satisfy the statute should be for money or money's worth and that is what we think this contract in its ultimate and general result amounted to.

Some elaborate arguments have been made against this conclusion. The Circuit Court of Appeals' view was that this was a mere swapping of free privileges and was not a service for a money charge. We do not think the privileges were free. We think that the one for messages was set off against the one for transportation, and that the one paid for the other.

The counsel for the respondent insist that our decision in *Postal Telegraph & Cable Company* v. *Tonopah and Tidewater Railroad Company, supra,* is inconsistent with our present conclusion. That case concerned the right of telegraph companies to recover against railroad companies for telegraph messages on contracts like the one here in question. The defense was that such contracts for an exchange of service while valid under the Interstate Commerce law for messages and transportation on or along the line, were invalid as to messages or transportation service beyond the railway lines. The Interstate Commerce Commission had held that such extras must be charged for by the railroad upon the basis of its published rates, and by the telegraph company upon reasonable rates as charged to other customers for similar service. It arose under the amendment to the Interstate Commerce Act of June 18, 1910, c. 309, sec. 7, which, in bringing in under the interstate commerce law telegraph and telephone and cable companes, provided "that nothing in the act should be construed to prevent telephone, telegraph and cable companies from entering into contracts with common cariers for the exchange of services." It was held that this proviso was general enough to allow an exchange of services off the lines as well as services on them to be exchanged. The court said that the railroad and telegraph had grown together in mutual dependence and that contracts of this sort for long terms had been nearly universal for fifty years, that as it was feared that such contracts would be unlawful if the telegraph companies were brought within the law, the amendment of 1910 was passed. This Court's conclusion was that under the contract all the great benefits on one side were consideration for all those conferred upon the other, and that Congress probably allowed the exchange because it had been frequently advised by the Commission that full performance of the exchange would not affect any public or private interest adversely. Speaking of the meaning of exchange, the Court said (p. 474):

"But exchange is a barter and carries with it no implication of reduction to money as common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received. This is admitted with regard to services on the line, and if so whatever services can be exchanged, can be exchanged in the same way."

This language is thought to show that the use of transportation service as a consideration for telegraphic messages could not prop-

erly be regarded as the equivalent of a money payment necessary to meet the requirement of section 500 as a basis of taxation. We do not think the case or the language quoted apposite. The Court in the opinion cited was merely deciding what the general expression exchange of service meant, and whether it must be narrowly, meticulously and rigidly construed exactly to conform to the general rule that all rates of tariff on the same class of service should be uniform. This Court was merely pointing out that in allowing a general exchange of service between two such partners as a railroad and a telegraph company, Congress did not intend to enforce the uniformity rule strictly and require a nice mathematical or monetary equivalence between the exchanged services. The issue here is different. It concerns a tax upon telegraph messages paid for by transportation, and the question is whether such payment is a charge which can be measured, or measures itself, in money. The most significant evidence that it is, appears in the conduct of the parties themselves, for in their exchange of such services they make actual payments to each other in money above a certain amount of business, which amount itself they determine by a carefully kept account of actual services in money figures.

A lengthy argument is made that the Revenue Act and the Interstate Commerce Act are *in pari materia* and therefore that the word "charge" in the Revenue Act should be controlled by the meaning of the same word in interstate commerce legislation, which it is said it could not be satisfied by a mere exchange of service. We think this is a far cry to the proper meaning of section 500 in imposing a tax, and do not think its correct interpretation is thus assisted.

Then it is said that paragraph (c) of section 501 of the Act of 1918 prevents the imposition of this tax. That paragraph is as follows:

"(c) The Taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. In case a carrier (other than a pipe line) principally engaged in rendering transportation services or facilities for hire does not, because of its ownership of the goods transported, or for any other reasons, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such goods, if the carrier received payment for such transportation, such tax, if it

can not be computed from the actual rates or tariffs of the carrier, to be computed on the basis of the rates or tariffs of other carriers for like services as determined by the commissioner. In the case of any carrier (other than a pipe line) the principal business of which is to transport goods belonging to it on its own account and which only incidentally renders service for hire, the tax shall apply to such services or facilities only as are actually rendered by it for hire. Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system."

Regulation No. 49 issued by the Internal Revenue Department to carry out this paragraph was as follows:

"If a telegraph or telephone line or lines along the line of any railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company, under contract transports commodities necessary to maintain or operate such telegraph or telephone line or lines along the line of such railroad company, such commodities being intended to be, or having been so used, and the railroad company makes no charge for such transportation, the charges which, but for such arrangement, would have accrued upon such transportation are exempt from the tax."

Paragraph (c) of section 501 is only to be found in the Revenue Act of 1918 and could not affect the validity of any taxes at issue in this case after August, 1922, when the revenue act of 1921 became applicable. In the next place, paragraph (c) with the enforcing regulation No. 49 has no application to the payment of taxes on telegraph messages. It is dealing with the transportation of goods and commodities by common carriers and the tax on rates received from their carriage. The words used make this interpretation necessary and it is supported by the fact that when in the revenue act of 1921 the taxes on freight and express shipments were repealed, this paragraph (c) was also repealed though the tax on telegraph messages was retained.

It is true that this result leaves a tax on the telegraph messages in the exchange of services and exempts receipts on the transportation side of the exchange. But Congress did not fix its taxes with reference to the particular phase of this contract by which charges for messages are balanced against those for transportation, and

doubtless had satisfactory reasons for exempting the one and not the other. The difference furnishes no ground for varying the meaning and scope of section 500 (f) or its application to the telegrams which were exchanged for the exempted transportation.

For the reasons given, the judgment of the Circuit Court of Appeals is reversed and the judgment of the District Court is restored.

A true copy.

Test:

Clerk, Supreme Court, U. S.